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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, PETITIONER,

vs.

TUSCARORA INDIAN NATION

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK, PETITIONER,

vs.

TUSCARORA INDIAN NATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 63 PETITION FOR CERTIORARI FILED MAY 11, 1959
NO. 66 PETITION FOR CERTIORARI FILED MAY 13, 1959
CERTIORARI GRANTED JUNE 22, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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[fol. 1]

BEFORE THE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of:

POWER AUTHORITY OF THE STATE OF NEW YORK

Hearing Room E
Federal Power Commission
411 G Street, NW.
Washington, D. C.

Transcript of Hearing—Tuesday, October 1, 1957

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

William J. Costello, Presiding Examiner.

APPEARANCES:

Thomas F. Moore, Jr., General Counsel, Samuel I. Rosenman, Special Counsel, Scott Litly and Harvey Schein, Members of New York Bar, 10 Columbus Circle, New York 19, New York, appearing on behalf of Power Authority of the State of New York.

Clarence W. Greenwald, Corporation Counsel, and Ralph Boniello, Deputy Corporation Counsel, City Hall, Niagara Falls, New York, appearing on behalf of the City of Niagara Falls, New York.

Hugh B. Chace, Jr., of Rice, Rice, Hustleby & Chace, 44 Falls Street, Niagara Falls, New York, appearing on behalf of the Town of Lewiston, New York.

V. Sumner Carroll, Niagara County Attorney, Court House, Lockport, New York, appearing on behalf of the County of Niagara, New York.

[fol. 2] Richard C. Doherty, Attorney for the Town of Niagara, 1417 Main Street, Niagara Falls, New York, appearing on behalf of Town of Niagara, New York.

Mason O. Damon, Attorney, of Dudley, Stowe and Sawyer, 620 M & T Building, Buffalo 2, New York, appearing on behalf of Industrial Power Consumers Conference.

Lauman Martin, Vice President and General Counsel, 300 Erie Boulevard West, Syracuse 2, New York, appearing on behalf of Niagara Mohawk Power Corporation.

Taggart Whipple, of Davis, Polk, Wardwell, Sunderland and Kiendl, 15 Broad Street, New York 5, New York, appearing on behalf of International Paper Company.

William J. Small, Superintendent of Schools, 607 Walnut Avenue, Niagara Falls, New York, appearing on behalf of Board of Education, City of Niagara Falls, New York.

John R. Davison, Solicitor General, Office of Attorney General, State of New York, Capitol, Albany, New York, appearing on behalf of People of the State of New York.

David L. Landy, of Moot, Sprague, Marcy and Gulick, 400 Erie County Savings Bank Building, Buffalo 2, New York, appearing on behalf of Basic Industries Power Committee. Edward F. Huber, of Naylon, Foster, Dean and Aronson, 61 Broadway, New York 6, New York, appearing on behalf of Rochester Gas and Electric Corporation.

William E. Murphy, Attorney, Center Street, Lewiston, New York, appearing on behalf of Central School District No. 1 of the Towns of Lewiston and Porter, Niagara County, New York.

John C. Mason, Deputy General Counsel, and Leonard Eesley, Assistant General Counsel, appearing on behalf of the Federal Power Commission.

[fol. 144] GEORGE R. RICH was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 151] By Mr. Rosenman:

Q. Mr. Rich, you are a partner in Uhl, Hall and Rich, are you not, under whose supervision this consulting work on the Niagara project has been carried on?

A. I am, sir.

* * * * * * *

[fol. 1408] Redirect examination.

[fol. 1409] By Mr. Rosenman:

Q. Therefore, can you say whether or not your estimate of 60,000 acre feet is a conservative estimate so far as the size of the reservoir is concerned?

A. Yes, sir. It is very conservative. I should say it is the irreducible minimum size.

* * * * * * *

[fol. 3477] Whereupon, GEORGE RICH was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Rosenman:

* * * * * * *

[fol. 3481] Q. Is this the same as saying that the proposed Niagara project will have a firm capacity of 1,800,000 kilowatts?

A. Yes, sir, it is.

Q. And do you know whether this information was supplied to the Congress during the hearing on the bill which became Public Law 85-159?

A. Yes, sir. The Authority's application, including this exhibit, was introduced in evidence at that hearing.

Q. What storage capacity in the reservoir is needed to produce the capacity shown on that chart?

A. Sixty thousand acre-feet, as is shown in Exhibit 13.

Q. Now, what equipment do you contemplate using in order to supply the capacity shown on that chart?

A. This equipment is specified in paragraph 6 of the Authority's application which you referred to as Item A, and in the order of the Federal Power Commission issued September 19, 1957.

Q. That is referred to here as "the license so far issued," is that right?

A. Yes, sir. It will consist of 13 generators at the Lewiston power station and 12 pump turbine motor generators in the Tuscarora Pumping Power Plant.

Q. With regard to the generators and turbines in the [fol. 3482] Tuscarora Power Plant, what does the September 19, 1957, order of the Federal Power Commission require?

A. The requirement is that there be 12 pump generator units and that each be rated at 20,000 kilowatts each as generators.

Q. Given the generator capacity of 20,000 kilowatts each, does this establish the capacity for the pumps?

A. In order for the generators to have a useable capacity of 20,000 kilowatts the turbines must be capable of driving the generators. For a given range of head this determines the type, sizes and characteristics that the turbine must have. This same hydraulic machine is going to serve as a pump by reversing its rotation. In order for it to function as a pump the motor which drives it must be capable of supplying the necessary power. The entire mechanism, Pump 7, turbine motor generator, is determined either by the pump discharge requirements or the generator capacity requirements. In this case it is the generator capacity which would control.

Q. Have the motor generators and the pump turbines been designed and specifications written?

A. Specifications for the motor generators and the pump turbines have been prepared. Bids have been solicited, and on the basis of the September 17, 1957, Federal Power Commission directive, letters of intent have been issued to the low bidders on this mechanical and electrical equipment.

[fol. 3483] Q. Mr. Rich, you said "September 17"; is that correct?

A. September 19, 1957.

Q. If the height of the dikes were increased 10 feet and the reservoir area reduced by 720 acres, would it be possible with the presently planned equipment to make use of the entire 60,000 acre-feet of reservoir volume thereby theoretically available?

Mr. Mason: Just a moment. Does that mean physically possible?

Mr. Rosenman: Yes.

Mr. Mason: I am not objecting.

Mr. Rosenman: All right.

The Witness: No. In the range above 100 feet total dynamic head we would get into a range of instability so that the pumps presently on order wouldn't be satisfactory.

Q. With the useable reservoir volume thus decreased could the 1,800,000 kilowatt firm capacity be maintained?

A. No, it could not.

Q. Is it possible to design and build equipment so that the smaller area and higher reservoir could be filled?

A. Yes, sir. Machines of higher operating speed would be required so that the pumps would operate satisfactorily against the higher head.

Q. Would you require more power for motors to drive these pumps?

[fol. 3484] A. Yes, sir. The horsepower rating of the motors would be increased from 39,600 horsepower to 47,600 horsepower.

Q. Would more power be needed to drive these more powerful motors?

A. Yes, sir, it would.

Q. In order to fill the reservoir in the same length of time as is planned under the proposed scheme of the Authority, how much more power would be required?

A. The plan presently proposed by the Power Authority requires that the water be pumped into the reservoir against an average head of about 75 feet. If the reservoir is increased in height by 10 feet, the average pumping head will be increased by 5 feet. To pump the water in the same length of time, then, would theoretically require approximately 7 percent more power.

There are other considerations which would increase the amount of additional power needed. The motors used with

the higher reservoir plant would require about 20 percent more power. If all of these motors were operated throughout the pumping cycle, the reservoir would be filled at a faster rate than under the proposed plan. Just how the actual operation of this pumping cycle would be worked out is not known, but it is certain that additional power requirements would be between 7 percent and 20 percent more than under the Power Authority's plan.

[fol. 3485] Q. Using the minimum increase of 7 percent additional power, how much does this amount to?

A. Approximately 25,000 kilowatts.

Q. If the pumping power for this plant is to be supplied from the Lewiston Plant, could the 250,000 kw project nighttime power output be maintained?

A. No. The project nighttime power output would be reduced a minimum of 25,000 kilowatts; that is, it could not be more than a total output of 225,000 kilowatts.

Q. Now, what change of equipment would be necessary?

A. The rotating machinery would have to be modified to obtain satisfactory although lower efficiencies. The turbine speed would be increased to 112½ r.p.m to 120 r.p.m.

Q. Does this result in additional costs?

A. Yes, sir. Owing to the higher speed, higher run-away speed and larger head on the servo motors, wicket gates, bearing and other turbine parts, it is estimated that the weight and cost of the turbine would increase 12 percent. We have received bids on the turbines for $11,291,350 plus a maximum of 20 percent for escalation.

Assuming that 50 percent of the escalation is actually realized, the additional cost would amount to $1,490,000.

Q. Would the motor generators have to be larger?

A. Yes, sir. To drive the pumps with best efficiency the horsepower rating of the motors would have to be increased [fol. 3486] from 39,400 horsepower to 47,600 horsepower.

Q. Now, what would be the additional cost for this increased horsepower?

A. It is estimated that the cost would increase 30 percent over the existing motor generators. We have received bids on the motor generators for $7,158,000 plus a ten percent maximum escalation. Again assuming that one-half of the escalation is realized, the additional cost would be $2,260,600.

The accessory electrical equipment would also increase in cost by about 30 percent. And from our project estimate, this would amount to $1,050,000.

The motor generator exciters would increase an estimated $17,000.

Q. Are these all of the important machinery and electrical modifications?

A. Yes, sir.

Q. What is the total cost of all the foregoing revisions to electrical and mechanical equipment?

A. I get a total of $4,817,000.

Q. What kilowatt capacity would these machines have as generators?

A. The capacity of these machines would be somewhat more than 20,000 kilowatts generating for the higher head. However, their output for the minimum head would be reduced to about 19,000 kilowatts.

[fol. 3487] Q. Are there any other disadvantages that you see in increasing the reservoir height?

A. Yes, sir. While I indicated that the change in speed and horsepower would produce satisfactory efficiencies at the higher head, it is estimated that the efficiency over both the pumping and generating cycles will average 2 percent less for the 10 foot higher head. If 20 percent of the total water available to the United States cycles through the reservoir, the value of the annual power loss would be $187,000, based on $2.92 per megawatt hour.

The present worth of such annual losses for 35 years at 6 percent would be $2,700,000.

Q. Could this power loss be partially regained by the increased firm capacity of the Tuscarora Power Plant?

A. No, sir. Although the turbine and motors would have a larger capacity at higher head, they do not have larger capacity at low head. For the higher reservoir the minimum water surface is at elevation 620, the same as for the proposed reservoir. This is the condition which determines the plant's firm capacity. The 120-r.p.m. machines for the 10 feet higher reservoir actually have somewhat smaller output for this critical condition. We have not evaluated the dollar value of this reduction in firm capacity.

Q. If the reservoir were made higher and of the shape

shown on Exhibit 109—are you familiar with that exhibit?
[fol. 3488] A. Yes, sir, I am.

Q. Could the area of the reservoir be reduced by 720 acres and still maintain a capacity of 60,000 acre-feet?

A. Yes, sir, it could.

Mr. Mason: Just a minute.

By Mr. Rosenman:

Q. Mr. Rich, we have been discussing the effect of the increased reservoir height upon the mechanical and electrical equipment and efficiencies. Now I want to direct your attention to whether or not structural changes would be required on the Tuscarora Pump Power Plant and on the dike.

A. Yes, this structural change would be required.

Q. You have either seen or heard the testimony here that the reservoir height could be increased by adding some parapets and curbs on the Tuscarora intake and a parapet to the dike. Do you agree with this proposal?

A. No, sir, I do not.

Q. Why not?

A. Regarding the intake—

Mr. Mason: Mr. Examiner, we are back where we were this morning—why doesn't he agree with somebody else? Ask him, Judge, what his opinion is, not whether he agrees with somebody.

By Mr. Rosenman:

Q. Well, what is your opinion about such proposal?
[fol. 3489] A. Regarding the intake structure, this top deck is a working area. Gates and hoist machinery are to be installed and maintained from this deck. Trash, trash racks and ice racks will be installed on the upstream face of the intake. We must be able to see the racks and have easy access to them if they require raking.

The intake is about 44 feet in total width. To reduce this and complicate the access to the gate hoist machinery and racks with parapets or curbs would be strictly jerry-built design.

Presiding Examiner: I think we had better stop for our luncheon recess.

Mr. Rosenman: We have just got another sentence in this answer.

Presiding Examiner: Oh, I'm sorry. I thought he had finished his answer.

The Witness: Stability considerations also indicate that the decks should be level. The proposal to use a parapet that could be counted on to serve as a breakwater would be at least as expensive as increasing the height of the dikes. If this parapet idea were one which would result in first-class and economical design, it would be a common feature of earth dams or dikes.

Presiding Examiner: We have reached our noon recess period. We will be in recess until 2:00 p. m., in this room.

. . . . . .

[fol. 3491] Presiding Examiner: You are welcome to do that. Let Mr. Rich come back, please.

Whereupon George Rich resumed the stand and testified [fol. 3492] further as follows:

Direct examination.

By Mr. Rosenman:

Q. Mr. Rich, we were discussing at the recess the structural changes which in your opinion would be necessary if we raised the height of the reservoir.

A. Yes sir.

Q. Would it also be necessary to provide additional concrete for the large retaining walls at each end of the dam?

A. Yes sir, these retaining walls that tie the earth embankment into the pump power plant would be higher, wider and longer.

Q. Have you estimated how much this would cost?

A. We estimate that additional concrete to raise the dike and enlarge the retaining walls would cost $482,000 for concrete and $135,000 for forms, for a total of $617,000.

Q. Would other modifications of the pump power plant be required?

A. Yes sir. To preserve the adequate safety against cavitation, the pump turbine runners would require lowering the turbine—I will read that over. Yes, to preserve the

adequate safety against cavitation of the pump turbine runners would require lowering the turbine 14 feet.

Q. And to lower the turbine 14 feet, would that require additional excavation?

[fol. 3493] A. Yes sir. We estimate that the additional excavation would amount to 139,000 cubic yards.

Q. How much would that cost?

A. Including the line drilling, we estimate this would cost $497,000.

Q. Now, would additional concrete be needed in the pump power plant?

A. Yes sir. We estimate that 3,830 cubic yards of concrete would be required.

Q. How much would this cost?

A. We estimate that the concrete, including forms and reinforcement, would cost $138,000.

Q. Would you have to make heavier the intake and draft tube gates?

A. Yes sir, the head on the intake gates would be 10 feet higher and the head on the draft tube gates would be 14 feet higher.

Q. How much would this increase the cost of the draft tube and intake gates?

A. We estimate the additional cost would be $100,000.

Q. Would the pen stocks have to be made heavier?

A. Yes sir.

Q. How much would this cost?

A. On the basis of head ratios, we estimate it would cost $94,000 more for the 10 feet higher head.

[fol. 3494] Q. How about the dike itself?

A. The average height of the proposed dike is about 40 feet. If the average height is increased to 50 feet, the additional volume would be about 90 cubic yards per lineal foot.

The shape of the reservoir proposed by Lewiston has essentially the same perimeter of about 40,000 feet, so the additional volume would be 3,600,000 cubic yards, which compares with Mr. Vermilya's testimony of 3,500,000 cubic yards.

At the average of 67 cents per cubic yard, this would amount to $2,400,000.

Q. Have you given us all of the important structural changes?

A. Yes sir.

Q. And what is the total cost?

A. I get $3,846,000.

Q. What would be the total additional structural cost, additional machinery cost, and power differential?

A. $11,363,000.

* * * * * * *

[fol. 3814]

BEFORE THE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of:

POWER AUTHORITY OF THE STATE OF NEW YORK

Transcript of Hearing—November 24, 1958

Hearing Room F-G,
Federal Power Commission,
441 G Street, Northwest,
Washington, D. C.

Monday, November 24, 1958.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a. m.

BEFORE:

Harry Frazee, Presiding Examiner.

APPEARANCES:

Samuel I. Rosenman, Thomas F. Moore, Scott Lilly, and John R. Davison, 10 Columbus Circle, New York 19, New York, appearing on behalf of the Power Authority of the State of New York.

Arthur Lazarus, Jr., Eugene Gressman, and Richard Schifter, Strasser, Spiegelberg, Fried & Frank, 1700 K Street, N. W., Washington 6, D. C., appearing on behalf of Tuscarora Nation of Indians.

Hugh B. Chace, Jr., Rice, Rice, Hustleby & Chace, 44 Falls Street, Niagara Falls, New York, appearing on behalf of the Town of Lewiston.

Richard C. Doherty, 1417 Main Street, Niagara Falls, New York, appearing on behalf of the Town of Niagara.

Clarence L. Greenwald, Corporation Counsel, on behalf of the City of Niagara Falls, New York.

[fol. 3814a] Hugh McM. Russ, Hodgson, Russ, Andrews, Woods, & Goodyear, 800 M & T Building, Buffalo 2, New York, appearing on behalf of the Industrial Power Consumers Conference.

David L. Landy, Moot, Sprague, Marcy & Gulick, 400 Erie County Br. Building, Buffalo 2, New York, appearing for the Industrial Power Consumers Conference and the Basic Industries Power Committee.

Stanley Grossman, 444 3rd Street, Niagara Falls, New York, appearing on behalf of Individual Tuscarora Allottees.

Willard W. Gatchell, General Counsel and Joseph B. Hobbs, Attorney, appearing on behalf of the Federal Power Commission.

Technical Aides and Consultants: Thomas M. Crum, Jr., Jack M. Shepley.

[fol. 3815] PROCEEDINGS

STATEMENT OF JOSEPH H. GUTRIDE

Presiding Examiner: The hearing will come to order, please. On January 30, 1958, the Commission issued an order issuing a license to the Power Authority of the State of New York under Section 4(e) of the Federal Power Act and Public Law 85195 approved by the President on August 21, 1957, for a proposed Niagara Hydroelectric Redevelop-

ment designated as Project No. 2216, on the Niagara River in Niagara County, State of New York.

By an order issued December 9, 1957, the Tuscarora Indian Nation was permitted to intervene in this proceeding.

On February 28, 1958, the Tuscaroras filed an application for hearing of the January 30, 1958, order issuing the license for Project No. 2216.

The Commission, by an order issued March 21, 1958, denied the application of the Tuscaroras for a rehearing. On May 16, 1958, the Tuscaroras filed a petition in the United States Circuit Court of Appeals for the District of Columbia, seeking a review of the Commission's order issuing the license for Project No. 2216. By its order filed November 14, 1956, the Circuit Court of Appeals for the District of Columbia remanded the matter to the Commission for further findings, stating in Section 7 of its opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation unless it can make [fol. 3816] the finding required by the proviso in Section 4(e) of the Federal Power Act which reads as follows:

"That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."

I have been designated by the Chief Examiner of the Federal Power Commission to preside at this hearing.

The certificate of the records officer of the Commission indicates that appropriate publication of service of the notice of the time and place of this hearing has been made.

This certificate will be copied into and made a part of the record at this point.

Notice is hereby given that pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Public Law 85-159 (71 Stat. 401), and by the Federal Power Act, particularly Sections 4(e) and 308 thereof, and the Commission's Rules of Practice and Procedure, a further public hearing shall be held commencing November 24, 1958, at 10:00 a. m. (EST)

in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., upon the questions presented and for the purposes set forth in Section VII of the aforesaid order of the Court filed November 14, 1958 in this matter.

/s/ Joseph H. Gutride, Secretary.

[fol. 3856]

OPENING STATEMENT OF MR. ARTHUR LAZARUS, JR. ON BEHALF OF THE TUSCARORA NATION OF INDIANS

Mr. Lazarus: If Your Honor please, I will start off by saying, quite frankly, that I have been somewhat shocked at the proceedings so far this morning, as to the wide, ranging scope that the applicant seems to think this hearing is supposed to take. If Your Honor please, I would like to get this hearing back on the track.

The decision of the Court of Appeals is:

"We are of the opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora Reservation unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding."

In the notice of the hearing from the Commission it says "Notice is hereby given that pursuant to the Federal Power Act" —etc.— "there will be a further public hearing upon the questions presented and for the purposes set forth in Section 7 of the aforesaid order of the court filed November 14, 1958, in this matter."

Now, Your Honor, this hearing is not for the purpose of reviewing the decision of the Court of Appeals for the District of Columbia. This Commission does not sit as an [fol. 3857] appellate review body over the Court of Appeals. The situation is vice versa. They have remanded the case for one particular purpose, to have a hearing under the Commission's rules to see whether we can make a finding under the proviso of Section 4(e), and the legislative history of the 1957 statute is not pevelant to that finding. Neither is the economic hardship, if any, that will

be caused all the communities if Indian lands cannot be immediately obtained. That, for the purpose of this hearing, is completely irrelevant.

So at the very outset I would like to ask, and I so move, for a ruling from you as to whether at this hearing we are going to stick to the issues as framed by the Court of Appeals in its remand order and as framed by the Commission in its notice of hearing. If we are going to stick to those issues, which are—and only whether the license will interfere or be inconsistent with the purpose for which the Tuscarora Reservation was created or acquired. If we are going to stick to those issues, fine. If we are not going to stick to those issues, and we are going to have a Donnybrook and a full open hearing on every conceivable question that may come to the mind of the Power Authority, then we should know that, too, because if that is going to be the ruling, I wish, under Section 1.28(a) of the Commission's rules to appeal it immediately to the full Commission. And if we do not get satisfaction there, I will make an application to the Court of Appeals for appropriate relief there.

[fol. 3858] Presiding Examiner: Now let me say at the outset here now that we are going into all issues which may be relevant to the determination of the question referred to this Examiner by the Circuit Court of Appeals for the District of Columbia.

Mr. Lazarus: That is correct.

Presiding Examiner: And I outlined that in my opening statement, what the issue was. Now what is relevant to that will be admissible.

Mr. Lazarus: All right, then I will serve notice at this point that any testimony relating to the legislative history of the 1957 Act, relating to the proceedings in the various courts, relating to the economic consequences of not taking Indian land, and I might say relating to the use of that portion of the Tuscarora Reservation which is not affected by the license, I will move that all of that testimony be excluded; and if any of that is admitted, I serve notice that I shall immediately appeal this decision, or seek relief where relief can be obtained.

Presiding Examiner: Well we will rule on your objections to the questions as the questions are asked.

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[fol. 3871]

STATEMENT OF POSITION BY TUSCARORA NATION OF INDIANS

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[fol. 3873] In determining whether the license will interfere with the original purpose of a reservation, therefore, the Commission necessarily must ascertain whether the Indians will be prevented under the proposed project from [fol. 3874] using a material amount[3] * * *

[3] Water conduits, transmission lines, power houses and access roads are examples of project works which generally do not require a material amount of land, which cause negligible interference with the use of property and thus which readily can be found consistent with the purpose for which a reservation was established. Accordingly, the Commission may license such facilities on tribal lands embraced within an Indian reservation. * * *

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[fol. 3878] Presiding Examiner? Are there other opening statements?

Mr. Chace: Mr. Examiner, the Tuscarora Indian Reservation lies completely within the town of Lewiston.

Mr. Gatchell: Mr. Examiner, may we have the gentleman's name?

OPENING STATEMENT OF MR. HUGH CHACE ON BEHALF OF THE TOWN OF LEWISTON

Mr. Chace: Hugh Chace.

Presiding Examiner: And who do you represent?

Mr. Chace: The Town of Lewiston.

* * * * * * *

[fol. 3879] Mr. Chace: Well the Town of Lewiston, it completely surrounds the Indian Reservation, on all sides of it, extending from east to west. At approximately the north boundary of the reservation, that is of the A and B on the map, is the Lewiston escarpment, which is a ridge, the lower portion of which, the southerly part is, about 250 feet higher than the northern portion. And that ridge runs from, well, it runs completely around Lake Ontario, actually. There-

fore, the Town of Lewiston is, of course, vitally concerned with this development.

The principal works of the Power Authority proposed are located within the Town of Lewiston. The license issued authorizes a taking of roughly 2,400 acres of land in the Town of Lewiston. Now that is exclusive of the 1,383 acres comprising a part of the Tuscarora Reservation. The Power Authority, as I understand it, and have been advised by them, has and will prove a possible alternative site for a reservoir which would not involve taking of any part of the Tuscarora lands. But with that plan the Town of Lewiston is extremely concerned. We participated in the hearings held in this matter last year, throughout, protesting against the size of the reservoir which the Power Authority proposed to use, and attempting to obtain a reduction in that size because of the tremendous effect that would have on the town. However, this alternative, as I [fol. 3880] understand it, will be vastly more consequential in its damage. It would involve taking the entire southerly part of the Town of Lewiston, extending over beyond the Colonial Village area, involving over 300 houses, a large cemetery, which would have to be relocated somewhere else, the bodies removed from that cemetery elsewhere; another small cemetery; and a school of some 15 rooms, a 15-room school house, housing 395 children. And the reproduction cost of which is estimated at around $1 million, and as to which present plans exist for great, substantial enlargement on it, another 11 classrooms to accommodate some 400 more children who are anticipated to be located within an air base situated in the Town of Niagara just to the south. The Town of Lewiston is the northerly town, the Town of Niagara is to the south of that, and the City of Niagara lies southerly of that. So we have a tier of municipalities, three municipalities, through which the water will flow from the upper Niagara River to the power plant site and to the reservoir site. The Town of Lewiston is the one which has most of the reservoir and all of the power plant.

Now this plan, this alternative proposal, would also involve cutting of the Saunders settlement road, which is the only state highway between the City of Lockport, County Seat of Niagara County, and the City of Niagara Falls,

and the Town of Lewiston, the village of Lewiston. To terminate that highway would leave no road for a space of [fol. 3881] 3½ miles from north to south, and no way for people to reach the easterly part of the county except by making a very extensive detour around the project.

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[fol. 3893]

OPENING STATEMENT OF HUGH McM. RUSS ON BEHALF OF THE INDUSTRIAL POWER CONSUMERS CONFERENCE

Mr. Russ: May it please Your Honor, I am Hugh McM. Russ, Attorney, of Buffalo, and appear here on behalf of the Industrial Power Consumers Conference.

Mr. Harvey Busch of the National Aniline Division of Allied Chemical Corporation is Chairman of this Conference and is with me today. This Conference was permitted to intervene in this proceeding by Order of this Commission of October 2, 1957. The Industrial Power Consumers Conference in these proceedings is speaking on behalf of many of the principal industries in Niagara Falls and Buffalo. I would like to say a word on behalf of the Buffalo industries. Mr. Landy will say a word on behalf of the Niagara Falls industries.

The Buffalo industries which have a great stake in this proceeding represent a wide variety of industries, particularly the milling, steel and chemical industries. Most of them have one thing in common. They operate primarily on 25-cycle power and were among the industries in Western New York that suffered as a result of the Schoellkopf disaster. They are among the industries to which the Act [fol. 3894] of Congress authorizing this license allotted 445,000 kilowatts of power to replace that lost as a result of the Schoellkopf disaster and the redevelopment provided for in this license.

The industrial power consumers in the Buffalo-Niagara Falls area have been hard hit during this interim period. Last year, primarily as the result of the loss of the Schoellkopf plant, power bills of consumers in this area were increased by an estimated $12 (sic) annually. In June of this year another application was made which would raise this increase to $20 million annually. Again, the asserted justi-

fication related primarily to the effects of the very industrial loss of hydroelectric generation at Niagara Falls. At the same time the Buffalo-Niagara Falls area has been the area of greatest unemployment in the State. Throughout the current year unemployment has been at a rate of 11 per cent to 12 per cent, almost twice the rate of any other major labor market in the State and twice that which the Federal Government regards as critical.

It is my understanding that the project before this Commission will produce 13 billion kilowatt hours of electricity annually. At the current price of power in Western New York, the loss of this power is a loss of $150 million annually to the economy of the surrounding area. The power resources of the Niagara have always been regarded as [fol. 3895] the greatest natural asset of Western New York. This great asset is already enriching the economy on the other side of the Niagara River, Canada. The people in Western New York have waited a long time for its economy to benefit from redevelopment of this natural resource, but it will not be an asset to Western New York or to anyone else unless it is developed on a basis whereby it will produce low cost power. Congress has specifically directed the development of this power. Proceedings before Congress clearly show that the development is to be on a basis which will restore low cost power to this area and decisions here, we respectfully submit, must be made with that objective in mind. We believe that this Commission, on the evidence which will be presented here, will have no difficulty in making the necessary finding under Section 4(e) of the Federal Power Act. There is no question here of adequate compensation for lands required for this project. Everyone, whether they are members of an Indian tribe or not, whose property is required for this project will receive adequate compensation.

Everyone is making an effort to keep industry in Western New York on the ground that low cost power will be restored to this area in 1961. Take away either the assurance that it will be low cost power or inject into the picture at this time uncertainty as to when it will become available and the economy of this area will suffer.

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[fol. 3955]

OPENING STATEMENT OF MR. CHARLES C. FICHTNER ON BEHALF OF THE BUFFALO CHAMBER OF COMMERCE

(The statement in full of Mr. Fichtner is as follows:)

My name is Charles C. Fichtner: I am Executive Vice President of the Buffalo Chamber of Commerce, an organization comprised of 2,200 firms and 3,350 individuals representing all phases of business and industry in the Buffalo Niagara Frontier area. On their behalf, and on behalf of the area's one and one-third million citizens, I wish to express appreciation for this opportunity of appearing here today.

The speedy completion of the Niagara power project is of vital importance to the present economy and future growth of Western New York. It is important to the present economy of the Buffalo area because a critical plant was destroyed in a rock-slide. Furthermore, the recession of 1957-58 has hit Buffalo employment particularly hard because of our identification with the automobile industry: any interruption over the next few months to the work in progress at Niagara would add seriously to our present unemployment rate of 11.3 per cent. The people of our community feel, therefore, that they cannot tolerate unnecessary delays at this time in the work schedule at the project.

Over the longer run, in the next few years, moreover, additional power will be greatly needed by industry, commercial establishments and residential consumers on the Niagara Frontier. Trends of energy consumption in the [fol. 3956] Buffalo area are strongly upward. Industrial demand for electric power has grown at a rate that has expanded the sale of power for industrial use from about 5 billion KWH's in 1947 to approximately 7 billion KWH's in 1955. As existing industries continue their expansion and as new industries come to Buffalo to utilize the transportation economies of the Erie and Niagara Thruways, now approaching completion, and the opening of the St. Lawrence Seaway in 1959, there will be further stimulae to that rising demand for electrical energy.

Concurrently, inasmuch as a major reason for the location of many important industries on the Niagara Frontier

is the assured availability of abundant power at rates which are lower than those of most other industrial areas, the addition of 1.8 million kilowatts to that supply will be a tremendous guarantee of continued pulling power for new industries and expansion of present operations and employment. In other words, the completion of the project, in itself, will generate industrial usage and, thus, of course, an increased commercial and industrial demand.

The Niagara Frontier is a vast complex of diversified manufacturing plants, all of which require a steadily expanding supply of power. Electrometallurgical and chemical fields particularly require large blocks of low-cost electric power as well as an enormous supply of good fresh water, of which the area has almost inexhaustible resources. The high importance of power to local industry can be illus- [fol. 3957] trated by the fact that the consumption of industrial power alone in Erie and Niagara counties has recently been approximately 7 billion kilowatt hours annually, almost as much electrical power as the total of six states which make up the New England District, the total of the seven states which make up the West North Central District and in excess of the total of eight states which comprise the Mountain District as defined by the U. S. Department of Commerce Census Bureau. Further, the two counties of Western New York consume more industrial electrical power than each of 39 different states including such heavily industrialized states as Massachusetts, New Jersey, Indiana, Wisconsin, Missouri and North Carolina.

The rising trend of demand for power by local industry has been accelerated by our recent and prospective industrial expansion. The Federal Bureau of Power readily agrees with the Buffalo Chamber that all of the 8 billion kilowatt hours available from the redevelopment of Niagara power could be utilized within an economic transmission area in the near future. Those of us who live and work in Western New York are, therefore, vitally interested in adding 8 billion, and possibly 12 billion, kilowatt hours to local production at the earliest possible date, for it is power to turn the wheels of industry, power to attract new industrial locations, power to light the homes of our citizens

and bring with it the benefits of more modern electrical living.

[fol. 3958] Accordingly, we are extremely concerned over the circumstances which have led to the calling of these hearings today. For one thing, some 705 million dollars are being invested in these new facilities. All of this will ultimately be raised through the sale of revenue bonds to private investors. If work on the project is interrupted because of the current dispute between the Power Authority of the State of New York and the Tuscarora Indian Nation that financial program will become beclouded and financing costs could be seriously increased. Those expenses and other increased costs accruing as a result of such delay would be passed along in the form of higher power costs which would unfavorably affect existing and potential Niagara Frontier industry. According to the State Power Authority estimates, a long interruption in their work schedule could result in a 25 per cent increase in power costs. Inasmuch as power rates charged to our industry have already been raised, and with another rate increase pending, the adverse consequences could be widespread and damaging to the point of disaster.

The Buffalo Chamber of Commerce takes no position as to the relative merits on each side in this dispute between the State Power Authority and the Tuscarora Indians. Its primary concern is that there be no delay in construction because of the grave effects of such a delay on the economy of the entire Niagara Frontier. We, therefore, request that everything possible be done, including face-to-face negotia[fol. 3959] tions, to bring about an early solution of the problem to the mutual advantage of all concerned. To that end, the Buffalo Chamber of Commerce offers its good offices and its every resource to effect a fair and reasonable settlement.

* * * * * * *

[fol. 3979] LAWRENCE L. KETCHEN was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Mr. Ketchen, have you given the stenographer your name and address?

A. The address is 683 Front Street, Weymouth, Massachusetts.

Q. What is your occupation?

A. I am a civil engineer.

Q. And you are associated with which firm?

[fol. 3980] A. I am associated with Charles T. Main, Inc., of Boston, Massachusetts, and assigned to the subsidiary firm of Uhl, Hall and Rich.

Q. What is the connection of Uhl, Hall and Rich with this project?

A. Uhl, Hall and Rich are the consulting engineers to the Power Authority of the State of New York.

Q. And are they responsible for the design of the project?

A. They are.

Q. Do they also supervise the construction of it?

A. They do.

Q. What has been your personal connection with the project?

A. I am assistant engineer to Mr. Rich, who is the head of the design section of Uhl, Hall and Rich.

Q. And what is your function with respect to the project?

A. I am responsible for the scheduling, the production and preparation of the drawings for the project.

Q. How long have you been associated with the project?

A. I have been associated with the project since the fall of 1956.

Q. Has it been exclusively your province to work on this project?

A. It has.

[fol. 3981] Q. Have you visited the premises of the entire project?

A. A great many times.

Q. How many times, approximately, would you say that you visited the terrain around the projected reservoir?

A. On the order of thirty times.

Q. And you have walked or ridden over the premises, over the terrain?

A. Yes, sir.

. . . . . .

[fol. 3984] Q. Will you tell us briefly what you did in order to design such an alternate reservoir?

Mr. Lazarus: I object to the line of questioning, Your Honor. The alternate reservoir or any possible alternate reservoir is not before the Committee at this time. The only thing before the Commission at this time is whether the proposed reservoir as shown on Exhibit No. 161 in inconsistent with the purposes for which the Tuscarora reservation was created or acquired.

I object to any testimony with respect to alternate sites.

. . . . . .

[fol. 3986] Presiding Examiner: Objection overruled.

Mr. Lazarus: I would like this under Rule 12.8(a) to be taken immediately up to the Full Commission because I think the public interest demands that we know at this stage of the proceeding what we are trying in this case.

The mandate of the Court of Appeals, it seems, is quite clear. The mandate talks about a finding under the first proviso of 4(e), and the first proviso of 4(e) talks only [fol. 3987] with respect to the Tuscarora reservation.

The Court of Appeals said that "We fail to find an inclination on the part of Congress to save costs to its sole licensee for the enormous power project at the expense of Indians living on an Indian reservation."

I think, Your Honor, that we have just got to decide now what we are going to try at this hearing, and therefore, I appeal from the ruling of the Chair to the Full Commission pursuant to the rules cited so that we may have a determination of what we are going to try in this hearing.

Presiding Examiner: Your appeal will be noted and ruled on at the conclusion of the evidence. You may proceed with your questions.

. . . . . .

[fol. 3988] A. Four alternate reservoir plans have been prepared to study the possibility of locating the required reservoir on lands adjacent to the Indian reservation.

Mr. Rosenman: May I ask the Examiner to give this Tuscarora Reservoir Alternate Scheme No. 2 a number, please for identification?

Presiding Examiner: It will be marked as Exhibit 162 for identification.

(The document referred to was marked Exhibit 162 for identification.)

By Mr. Rosenman:

Q. Will you state generally what this 162 for identification shows with respect to the land which has been substituted in pink for the land that was the Indian reservation on Tuscarora Reservoir Alternate Scheme No. 1, Exhibit No. 161?

A. Exhibit No. 162 illustrates a proposed reservoir designed to use the available land abutting the Indian reservation and excluding the two major cemeteries and the adjacent homes on Saunder's Settlement Road.

Q. Will you show the Examiner where the two cemeteries are to which you referred?

Try to describe it.

A. Yes, I will. The two cemeteries in question are the Niagara Falls Memorial Park located on Military Road, and St. Michael's Cemetery located on Saunders Settlement Road.

[fol. 3989] Q. Which is Saunders Settlement Road on the map?

A. The Saunders Settlement Road runs east and west starting at Military Road south of Niagara Falls Memorial Park.

Military Road runs in a general southeast to northwest direction intersecting Packard Road to the south and Lewiston Road to the north.

Q. Is Saunders Settlement Road a main traffic artery?

A. Yes, it is.

Q. What does it connect?

A. Saunders Settlement Road is a state highway connect-

ing the town of Lewiston and Niagara to the town of Lockport.

Q. Will you state what you find, as an engineer, with respect to that proposed alternate?

A. The reservoir has been limited in a westerly direction by Military Road, to the south by Lockport Road, and the main line of New York Central Railroad.

Q. What do you mean when you say "limited by"?

A. We have considered Lockport Road and the main line of the New York Central Railroad to be the limiting physical facilities to the south of the area involved.

In other words, we do not feel that we can go beyond those limits inasmuch as moving those limits would be extensive projects.

Q. Would this require relocating the main line tracks of [fols. 3990-3991] the New York Central if you went beyond?

A. To go further to the south would require relocation of the main lines of the New York Central Road.

It would also have a direct bearing on the proposed grade crossing elimination program now in progress in Niagara Falls.

Q. Where does the grade crossing elimination program come in this area?

A. The connection between the main lines now passing through the city of Niagara Falls and this main line track in the town of Lewiston would be by a north-south line connecting the main line tracks in question just east of Military Road.

Q. And will you explain why Military Road is a delimiting factor to the west?

A. There is a large housing development known as Military Park immediately west of Military Road.

Also, the lands to the west of that development are presently being used in the construction of the Niagara Power Project.

Q. Now what about extension to the east?

How far east do you take this?

Presiding Examiner: Before he answers that, before you get on to a new subject, let's take our afternoon recess for 15 minutes.

(At this point, 3:15 p. m., a recess was taken until 3:30 p. m.)

[fol. 3992] Presiding Examiner: The hearing will come to order, please.

Direct examination (continued).

By Mr. Rosenman:

Q. At the time of the recess, Mr. Ketchen, I asked you how you fixed the easterly limit of the reservoir.

A. The easterly limit of the reservoir south of the Indian Reservation was established to provide a storage volume of 60,000 acre feet within the reservoir.

Q. Is that the size of the reservoir indicated on Exhibit 161?

A. Yes, sir.

Q. Now on Exhibit 161, the portion in green is the same size as the portion in green in 162, is it not?

A. That is correct.

Q. And the other color on 162, namely, the red, is the amount which is necessary to take, to replace the Indian land and provide a reservoir of 60,000 acre feet?

A. That is correct.

Q. Now will you state whether or not you abandoned this project as impractical?

A. We abandoned the shape, or location of reservoir, as being impractical from the engineering point of view.

Q. Will you state the reasons?

A. Because of the excessive length of embankment and the large ground surface area involved in order to obtain the storage volume.

[fol. 3993] Q. Now what do you mean by the excessive length of the embankment? Will you compare it generally with Exhibit 161?

A. In the design of any reservoir to contain a designated storage volume an attempt should be made to keep the embankment as short as possible. The perfect reservoir, of course, would be the circle which is impractical, again. Any deviation from that shape, the perfect shape, increases the total length of embankment required, and the more angles and turns you put in to enclose a given area, the longer the embankment will be.

Q. Is the embankment synonymous with the dike, what we call the dike of a reservoir?

A. Yes, it is.

Q. Because this examiner was not in the prior hearings, would you explain generally how this reservoir is constructed—in very general terms?

A. This reservoir is constructed by building up from existing ground surfaces a dike or embankment to enclose an area, permitting water to be stored behind this dike or embankment.

Q. And how are the dikes constructed? Is this an expensive operation?

A. Dikes are constructed by means of an impervious earth core surrounded by a rock enclosure to provide the necessary stability. In addition, drains and filters must be provided to prevent the leaching or leaking out of fine [fol. 3994] materials. This is an expensive procedure.

Q. How high are the dikes to be on Exhibit 161, the present project, approximately?

A. The dikes vary in height, dependent upon the land on which they are built. In other words, they are built to a prescribed top limit. That is elevation 655. Those reservoir dikes, or embankments, will be on the order of 30 to 40 feet high on the average.

Q. And the purpose of these dikes is to contain the water in the reservoir for supplemental power, is that right, and storage of water taken from the Niagara River?

A. That is correct.

Q. You were giving us the reason why the project on the proposed alternate on Exhibit 162 is considered impractical by you.

A. The land to the easterly end of this reservoir is getting high in elevation, which means that the storage volume per unit of area becomes low, and therefore the use of the land inefficient.

Q. Does that mean that the higher the land is, the more acreage must be taken?

A. That is correct.

Q. And you say that the land ascends as you go east here?

A. That is correct.

[fol. 3995] Q. Proceed.

A. A further disadvantage of this proposal is the large number of corners in the dike dictated by many use restrictions which we assumed for this layout. The danger of these corners is in the settlement of the material as the dike ages, producing cracks at the corners which must be kept in control and sealed.

Another disadvantage is the discontinuance of Saunders Settlement Road and East-West State Highway, and the removal of a large number of houses on Miller and Saunders Settlement Roads, and the complete elimination of Colonial Village.

Q. Will you tell us what Colonial Village is? First, will you locate it on the map?

A. Colonial Village is a housing development in the easterly portion of the proposed reservoir, east of Miller Road, and adjoining Saunders Settlement Road.

Q. There will be specific testimony as to the number of houses. Do you know approximately how many there are in this area?

A. Offhand I do not know.

Q. What other disadvantages are there of this?

A. There is a public school also involved, I believe it is Public School No. 9, located at the intersection of Military Road and Saunders Settlement Road.

OFFERS IN EVIDENCE AND OBJECTIONS THERETO

Mr. Rosenman: And may I ask that this be received in evidence?

[fol. 3996] Presiding Examiner: If there is no objection it will be admitted.

Mr. Lazarus: It is already objected to, Your Honor.

Presiding Examiner: It will be noted.

(The document referred to, heretofore marked for identification as Exhibit No. 162, was received in evidence.)

Mr. Doherty: May I interrupt for a minute? I think the witness was mistaken when he said "ilitary Road is the intersection at which School 9 lies.

The Witness: Miller Road. I said Miller.

Mr. Doherty: I am sorry.

Mr. Lazarus: Is the witness testifying from notes, or from a written statement?

Mr. Rosenman: He is testifying from notes.

Mr. Lazarus: There is nothing he can submit for the record and—

Mr. Rosenman: No.

Mr. Lazarus: —and we can dispose of most of this dilatory tactic?

By Mr. Rosenman:

Q. Going back to 162, Mr. Ketchen, have you computed the area in the red section, the number of acres?

Mr. Hobbs: What exhibit, so it will show in the record?

Mr. Rosenman: 162.

The Witness: I do not have those here.

[fol. 3997] By Mr. Rosenman:

Q. You do not have them here?

A. No.

Mr. Rosenman: I ask that they be given a number for identification a map entitled "Tuscarora Reservoir—Alternate Scheme No. 3".

Presiding Examiner: It will be marked Exhibit 163 for identification.

(The document referred to was marked for identification as Exhibit No. 163.)

By Mr. Rosenman:

Q. Will you state what Exhibit 163 for identification is?

A. Exhibit No. 163 is similar to Exhibit No. 162, with the exception that the area along Saunders Settlement Road, and including the St. Michaels Cemetery, and adjoining housing, have been included in the reservoir boundaries. The easterly limit of this reservoir has been adjusted to provide, again, the minimum storage volume of the 60,000 acre-feet.

Q. In other words, in Exhibit 163, you have included one of the two cemeteries which you excluded in 162, is that correct?

A. That is correct.

Q. And that foreshortens the red part of the exhibit, so that you do not have to go so far east in order to get the 60,000 acre-feet?

[fol. 3998] A. That is correct.

Mr. Hobbs: Mr. Examiner, I would like to have a copy of the exhibit so I can follow the testimony.

Mr. Rosenman: I am sorry.

By Mr. Rosenman:

Q. Will you state what the disadvantages of this scheme are from an engineering and other points of view?

A. The disadvantages of this scheme are the same as in Exhibit No. 162. While the number of dike corners have been reduced, an additional number of people have been replaced, or displaced, from their homes on Saunders Settlement Road. In addition, it will require the removal of the cemetery, St. Michaels Cemetery.

Mr. Rosenman: May I ask that be received in evidence?

Presiding Examiner: Exhibit 163 will be received in evidence.

(The document referred to, heretofore marked for identification as Exhibit No. 163, was received in evidence.)

Presiding Examiner: And I assume you wish to reserve your objection, Mr. Lazarus?

Mr. Lazarus: Rather than get up each time, let it be understood I object all the way through.

Presiding Examiner: It will be so noted.

By Mr. Rosenman:

Q. I show you a map labeled "Tuscarora Reservoir— [fol. 3999] Alternate Scheme No. 5".

Mr. Rosenman: Will the Examiner assign a number for identification to this?

Presiding Examiner: It will be marked Exhibit No. 164 for identification.

(The document referred to was marked for identification as Exhibit No. 164.)

By Mr. Rosenman:

Q. Will you describe what you did on Exhibit 4? First of all, is the section of the map in green the same as the section of the map in green on Exhibit 161?

A. That is correct.

Q. In other words, the green section of the map is constant through all of these proposed alternates, is it not?

A. That is correct.

Q. Now will you tell the Examiner what you did on this Exhibit 164 for identification?

A. Alternate Scheme No. 5, or Exhibit 164, is again an adaptation of Exhibit No 161, with the exception located in the northwest corner of the reservoir. At this point the reservoir boundaries are extended north of Upper Mountain Road and west of Bronson Drive. This is to include a greater portion of the low land in the Pisa Creek drainage basin. Again, the easterly line of the reservoir has been located to provide in the total reservoir the storage volume of 60,000 acre-feet.

[fol. 4000] Q. And does Exhibit 164 bypass both cemeteries?

A. That is correct.

Q. Proceed.

A. The area of this addition proposed on the northwest corner—

Q. You mean the amount in pink on the upper part of the map?

A. That is right.

Q. Yes.

A. —is approximately 270 acres. The greater portion of this area is at an elevation below 620, the minimum elevation of the Tuscarora power pool. Water stored below the level of 620 is considered dead storage, and cannot be used to produce power in either the Tuscarora or the

Niagara power plants. The use of this area is further complicated by the proximity to the Niagara escarpment—

Q. Will you indicate that on the map to the Examiner, please, the Niagara escarpment?

A. The Niagara escarpment is immediately north of this area in question and represented by the heavy black line running in a general east-west direction.

Q. That is where the land drops off to 150 or 200 feet, is it not?

A. That is correct.

Q. What is the disadvantage of being close to that [fol. 4001] escarpment?

A. As the rock, or rather, as the reservoir approaches this escarpment, we find that the area is fissured a great deal more than in other sections, and we run the possibility of loss of large quantities of water through the rock down into the river, or down into the low areas beyond.

This is further complicated in the Fish Creek area, especially in the drainage basin where it can be observed that large quantities of the normal flow within Fish Creek disappear into the rock and reappear much lower down on the face of the escarpment.

[fol. 4002] Q. Will you show that to the Examiner on the map, please, and indicate it if you can?

A. The Fish(?) Creek Drainage Basin generally runs in an east-west direction, and is indicated close to the intersection of Military Road and Lewiston Road. In this distance, between the reservoir, suggested reservoir, and the escarpment, the water escapes into the ground through the fissures mentioned, and reappears on the face of the escarpment some distance below the top.

Q. Have you observed that phenomenon yourself?

A. I have.

Q. What does that indicate to you as to the advisability of using that pink area at the north end of the reservoir for reservoir purposes?

A. We believe from an engineering point of view it would be inadvisable to place any portion of the reservoir within the area in which this phenomena appears.

Q. So that in your opinion Exhibit No. 164 for identifi

cation, showing that reservoir, is impractical from an engineering point of view?

A. That is correct.

Mr. Rosenman: May I ask this be received in evidence, please?

Presiding Examiner: Exhibit 164 will be received in evidence subject to the objection of Mr. Lazarus.

[fol. 4003] By Mr. Rosenman:

Q. I show you a map entitled "Tuscarora Reservoir—Alternate Scheme No. 4" and ask you what that shows?

A. Alternate Scheme No. 4 employs the land immediately adjacent to the Tuscarora Power House.

Q. Will you point that out to the Examiner, please?

A. Tuscarora Power House is immediately west of Military road and to the south of Upper Mountain Road.

Q. That is indicated on the map at the extreme right end of the horizontal thick black line, is that right?

A. That is correct.

Q. Proceed.

A. This plan includes the Niagara Falls Memorial Park Cemetery, the property along Saunders Settlement Road, and St. Michael's Cemetery. The reservoir boundary south and east of the Indian reservation has again been adjusted to provide a total storage volume of 60,000 acre feet.

Q. The eastern boundary, however, does not extend as far as it did in the other exhibits, is that right?

A. That is correct.

Q. And how is that accounted for?

A. By the increased area provided to the west, we can reduce the easterly limits.

Q. In all of these exhibits is there a stone quarry indicated?

[fol. 4004] A. Yes, there is.

Q. Will you point that out on this scheme No. 4?

Mr. Rosenman: Incidentally, Mr. Examiner, I forgot to ask you to give it a number.

Presiding Examiner: We will do that when you offer it.

Mr. Rosenman: All right.

By Mr. Rosenman:

Q. On scheme No. 4, will you point out where the stone quarry is?

A. There is a stone quarry located near the intersection of Packard Road and Lockport Road.

Q. In all of these alternates have you avoided including the stone quarry, and is it necessary to avoid it?

A. In every case in our studies we have attempted to keep the southeasterly boundary of the reservoir away from this quarry sufficient distance so that we may be assured of eliminating the potential leak hazard into this rather deep excavation.

Q. In other words, when you have a quarry at the bottom of a reservoir, it provides leakage?

A. It could very well provide leakage if we had the water storage close to this deep excavation.

Q. And for that reason you have avoided it in all of these alternates?

A. That is correct.

[fol. 4005] Q. Now, will you tell us why you cannot go further west with this reservoir?

A. Expansion of this reservoir to the west is prevented by the presence and the necessity of a surge basin between the Niagara Power Plant and the Tuscarora Power Plant.

Q. Will you explain that to the Examiner?

A. This surge basin is required to dissipate the energy in the flowing water in the event of a failure or a complete shutdown of the Niagara Power Plant.

Q. And therefore you cannot extend it further west?

A. That is correct.

Q. Now what about extending this further south?

A. To extend this reservoir further south we would encompass a large housing development and great amounts of land which are presently being used as construction bases for the contractors on the work.

Q. Now will you compare scheme No. 4 as to desirability, with the other alternate schemes which you have testified to?

A. Scheme No. 4 is the most desirable scheme of the four alternate schemes proposed.

Q. Will you state its disadvantages with respect to scheme No. 1?

A. This plan, like all the others, requires the displacement of a great many people, relatively long reservoir embankments or dikes, again the use of land at elevations [fol. 4006] which will permit only very limited water storage, the discontinuance of a major east-west highway—

Q. What is the name of that?

A. That is Saunders Settlement Road. —and the use of developed property of high use value in the Niagara Falls Memorial Park and the St. Michael's Cemetery. In addition, this creates a real drainage problem in connection with the Gill Creek Drainage Basin.

Q. Will you explain that?

A. The large swamp which lies to the east of the reservoir and within the Indian reservation has its outlet through Gill Creek which presently, or on these plans, is shown crossing the green and pink sections about in the middle of the reservoir.

Q. Will you point Gill Creek out to the Examiner on the map, please?

What would that require in the way of pumping?

A. This would require a small, full-time normal pumping to provide the proper drainage of the creek and a large emergency pumping capacity to prevent possible severe flooding of the large swamp area within the Indian reservation.

Mr. Rosenman: I ask that this scheme No. 4 be received in evidence.

Presiding Examiner: It will be marked Exhibit No. 165 for identification and received in evidence subject to the objection of Mr. Lazarus.

[fol. 4007] (The document above referred to was marked for identification as Exhibit No. 165 and received in evidence.)

By Mr. Rosenman:

Q. I would like to direct your attention to that swamp which you testified to as located on scheme No. 1, which

is the one on which the authority is now working. Is that swamp included in the reservoir area in part?

A. A very small portion of it is included within the present reservoir planning.

Q. Will you state from an engineering point of view whether it is possible, if the reservoir on Exhibit 161, alternate scheme No. 1, is constructed, whether it is possible to drain that swamp and restore it to normal agricultural use?

A. Under the proposed plans, the normal drainage requirements for the swamp would be continued. If further drainage was required to reduce the permanent water levels within the swamp, it could be provided.

[fol. 4008] Q. And how many acres of land, approximately, are included in that swamp area?

A. Approximately 300 acres.

Q. And it is your testimony that that can be made profitable agriculturally by drainage?

A. Yes, sir.

. . . . . .

By Mr. Rosenman:

Q. Will you compare the cost of the reservoir on Exhibit 161 with the cost of constructing the reservoir on 165, exclusive of land values?

A. We find that the cost of the reservoir shown on Exhibit No. 161, exclusive of land or land rights, to be [fol. 4009] $18,698,000, and the estimated cost of the reservoir shown on Exhibit No. 165 to be a total of $21,946,000.

Q. That is in excess of how much?

A. Approximately 3½ million.

Q. And it is your testimony that Exhibit 165 shows the only possible alternate to 161?

A. That is correct.

Mr. Rosenman: Now, Mr. Examiner, Mr. Ketchen's qualifications as an engineer are all set forth in detail in this hearing, in the original hearings. Would you want to have them repeated?

Mr. Lazarus: I will stipulate to them.

. . . . . .

Cross examination.

* * * * * * *

By Mr. Lazarus:

Q. The map we have on top now is—

[fol. 4010] A. 161.

Q. —161. In the area shown in pink, how deep will the reservoir be if it is constructed there?

A. You mean how deep will the water be?

Q. Yes, on the land.

A. The elevation of the top of the water will be at 645. And if you look at the contours, you will see that varies. I see 640 as being in one small section to the east of the reservoir.

Q. One small section to the east. Now running down I see the number 613, 630, so that we will have a minimum of, what, five feet deep—

A. At 640 you would have five feet.

Q. And what would you say the maximum would be within that area in pink?

A. It would depend on what the lowest contour would be—

Q. That is my question.

A. That would be—I see 630 right offhand, the 620 section down on the Gill Creek area.

Q. I see 613 off the road there. Well, in any event—

A. That is 613. That would be the low point on Fish Creek, that is correct.

Q. In any event, do you think there could be any houses in that area?

A. I do not follow your question.

Q. Do you think that anyone can live in a house in that [fol. 4011] area shown in pink? After the reservoir is constructed?

A. Of course not.

Q. Do you think anyone can farm there?

A. No, sir.

Q. Do you think anyone can hunt there?

A. No, sir.

Q. Grow trees and cut timber?
A. No, sir.

. . . . . .

[fol. 4018] Further direct examination.

By Mr. Rosenman:

Q. Mr. Ketchen, the amount of land taken on all of these exhibits includes land for transmission lines, does it not?
A. That is correct.
Q. Are transmission lines now being built on Exhibit 161?
A. Yes, they are.
Q. Generally where are they being constructed now? Can you indicate?
A. Transmission lines are being constructed along the southerly, northerly, easterly limits of the reservoir as well as in other portions of the general area.
Q. So far as the reservoir area is concerned, if 161 were to be abandoned and 165 were to be adopted, would it be necessary to move the transmission construction now in progress to new places on the map?
A. Portions of the transmission lines presently under construction would have to be removed and relocated.
Q. Have you estimated the cost of that?
[fol. 4019] A. I do not believe I have that figure here.
Q. Do any of your associates have it?
A. I believe we have the information.

. . . . . .

[fol. 4020] By Mr. Rosenman:

Q. While they are looking that figure up, Mr. Ketchen, can you tell us, if you had never started to build transmission lines, would transmission lines on 165 be more expensive than on 161?
A. I believe the transmission lines on 165 would necessarily be longer in length than those required on 161.
Q. Why?
A. Because of the greater length of the reservoir to the south, requiring a detour to the south of the transmission lines.

Q. Do you have an estimate of how much more the transmission lines on 165 would cost than 161?

A. We estimate that the difference in cost will be $300,000.

Q. And how much do you estimate the cost of abandoning the present transmission lines and building the new ones?

Mr. Lazarus: I object to getting in a cost figure which is based upon the mistake of the Power Authority. If they built the transmission line down to New York City, it does not enter into the cost estimates.

Mr. Rosenman: We are attempting to show what a change of location would cost completely, not only to the Power Authority, but to everyone else.

Presiding Examiner: You may reserve your objection.

Mr. Lazarus: It is reserved. And probably covered by [fol. 4021] my blanket objection.

The Witness: The cost of the changed relocated lines, $1,200,000.

By Mr. Rosenman:

Q. Would that be added to the $300,000?

A. Yes, it would be.

* * * * * * *

[fol. 4022] Further cross examination.

By Mr. Lazarus:

Q. If the reservoir were not to be located on the Indian lands shown in pink on Exhibit 161, would the transmission lines have been constructed on that area shown in pink?

A. The transmission lines would be constructed in the area which I just described as lying between the tow of the reservoir embankment and the taking line.

* * * * * * *

[fol. 4026] Q. We will start from the very beginning, and the very first question was:

In your testimony you have said that the transmission line is plotted to go along between the bottom of the dike and the outer lines of the take area. Am I correct?

A. That is correct.

Q. Then I have said: If you could not take Indian land for a reservoir, would you still run the transmission line through the Indian reservation? This is way back in January. Not now, but way back in January.

A. If we could not take this area as designated in pink, and substituted other areas in pink as shown on 165?

Q. Or one of the other maps, yes.

A. Would we then run the transmission lines across the reservoir?

Q. Across the Indian reservation.

A. Across the Indian reservation?

Q. Yes.

A. That is your question?

Q. Yes.

A. Our estimates call for it to follow the tow of the slope and the take line.

Q. All right. Then the answer is: you would not have run across the reservation?

[fol. 4027] A. That is right.

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[fol. 4034]

COLLOQUY BETWEEN COURT AND COUNSEL

Presiding Examiner: The hearing will come to order, please.

Are there any preliminary matters to be heard before we hear the first witness?

Mr. Lazarus: Yes, Mr. Examiner.

I have here an appeal from the ruling of the Chair with respect to the admission of evidence, an appeal to the Full Commission pursuant to Rule 1.28(a) appealing from the ruling of the Chair allowing into evidence testimony with respect to the availability of alternative sites and the relative cost of alternative sites, and also requesting the full Commission to enter an order limiting the testimony at this hearing to the sole issue presented to the Commission on remand from the Court of Appeals, that is, whether the requested license will be consistent with the purpose for which the Tuscarora Reservation was established.

Presiding Examiner: Have you filed your notice with the Commission?

Mr. Lazarus: I have not yet done so, sir. I just had this come in this morning. As I read the rule, I was to file this directly with you, and you, under the rule, were to transmit it to the full Commission. If I am not correct in that, I would—

Presiding Examiner: This is under Rule 1.28(a)?

Mr. Lazarus: A, yes. Which, as I read the rule, directs [fol. 4035] the Presiding Officer to forward the appeal to the—it says:

"In such instance, the matter shall be referred forthwith by the Presiding Officer to the Commission for determination."

As I read it, that had to be filed with you, sir.

Presiding Examiner: It is your contention that prompt decision of the Commission is necessary to prevent detriment to the public interest?

Mr. Lazarus: That is correct, particularly in view of the deadline established by the Court of Appeals, and the fact that we now have very many people in the room, the applicant's own position is that every day's delay costs approximately $200,000. If we can eliminate this irrelevant testimony, I am sure we can cut down at least a week of hearings, which will save them about $1,000,000 according to their own figures.

Mr. Rosenman: Of course there was not such testimony, Mr. Examiner, and no such statement.

Presiding Examiner: Your motion will be incorporated in the record at this point.

Mr. Lazarus: This is an appeal which I would like to file with you, sir.

Presiding Examiner: Excuse me, your appeal will be incorporated in the record at this point, and the Examiner will rule on it at the conclusion.

[fol. 4036]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Project No. 2216

IN THE MATTER OF POWER AUTHORITY
OF THE STATE OF NEW YORK

APPEAL FROM RULING OF PRESIDING OFFICER
AND MOTION FOR LIMITATION OF ISSUES

Intervenor, the Tuscarora Nation of Indians, hereby appeals pursuant to Rule 1.28(a) of the Commission's Rules of Practice and Procedure from the decision of the presiding officer in the above-captioned case permitting the applicant to introduce evidence with respect to the availability and relative cost of alternative sites for the proposed storage reservoir, and respectfully moves the Commission for an order limiting the testimony at the hearing to the sole issue which may be considered under the mandate of the Court of Appeals for the District of Columbia Circuit, to wit: whether a license which would authorize the flooding of 1383 acres of land within the Tuscarora Reservation will interfere or be inconsistent with the purpose for which that Reservation was created or, acquired.

In support of this motion and appeal, intervenor shows as follows:

In Tuscarora Indian Nation v. Federal Power Commission, F. 2d (C.A.D.C., Nov. 14, 1958), the Court declared in part (slip opinion, pp. 11-12):

[fol. 4037] "We are of the opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding. If the Commission concludes that the finding can be made and makes

it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand. * * *".

Intervenor submits that the mandate of the Court of Appeals contemplates a determination by the Commission with respect to the Section 4(e) finding on the basis of the existing record, and does not contemplate a further hearing for the presentation of additional testimony. Even if the Court did intend for the record to be reopened, however, the language of its decision and the language of the Commission's notice of hearing (23 Fed. Reg. 9101) make clear that any new evidence must relate to the question of whether the license is compatible with the purpose for which the Tuscarora Reservation was established—the only issue presented in the first proviso of Section 4(e) and the only purpose for which this case was remanded to the Commission by the Court.

During the first day of the hearing on November 24, the [fol. 4038] applicant offered evidence on the availability and relative cost of reservoir sites outside the Tuscarora Reservation. Intervenor entered a timely objection to the introduction of this evidence on the ground that the subject matter was outside the scope of the hearing and, therefore, irrelevant. The presiding officer overruled this objection. Intervenor then orally requested an appeal pursuant to Rule 1.28(a), which request was denied in effect when the presiding officer stated that he would rule on the question after the close of proof.

Intervenor herewith formally appeals in writing from the ruling of the presiding officer. This appeal falls within the scope of Rule 1.28(a) since the admission of evidence of the character which applicant has introduced and plans in the future to introduce[1] will prolong the hearing beyond

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[1] According to counsel for the applicant, "In addition to producing proof on the main subject of this hearing, we believe that we have a duty to place in the record facts showing that two conclusions expressed in the opinion of the District of Columbia Court of Appeals were based upon factual misapprehensions. The Court stated that the Commission, when it issued its January 30th order,

[fol. 4039] the November 29 deadline set by the Court of Appeals and thus will be detrimental to the public interest —causing the very type of delay which the applicant allegedly seeks to avoid.

Wherefore, intervenor prays that the Committee direct the presiding officer to exclude the above-described evidence and, henceforth to limit the testimony at the hearing to the sole issue involved, to wit: whether a license which would authorize the flooding of 1383 acres of land within the Tuscarora Reservation will interfere or be inconsistent with the purpose for which that Reservation was created or acquired.

Respectfully submitted,

STRASSER, SPIEGELBERG, FRIED & FRANK

By .....
Arthur Lazarus, Jr.
1700 K Street, Northwest
Washington 6, D. C.
Attorney for Tuscarora Indian Nation, Intervenor

[fol. 4040] Of Counsel:
Eugene Gressman
1700 K Street, Northwest
Washington 6, D. C.
November 25, 1958

Mr. Lazarus: That is not my understanding of the rule, Your Honor. My understanding of the rule says that you are directed to forward it to the Commission for a determination.

Presiding Examiner: I do not see that in the rule.

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did not understand that Tuscarora land was necessary for the project. * * * The second point upon which we believe the Court had a misunderstanding of the facts, as evidenced by its opinion, involves the legislative history of the 1957 Act which authorized the Niagara Project."

The Commission of course, has no right to review or otherwise sit in judgment on the decisions of the Court of Appeals and admission of the proposed testimony, therefore, would be highly improper.

Mr. Lazarus: Well, the rule, as I read it, says that rulings of presiding officers may not be appealed during the course of hearings except in extraordinary circumstances—which these are—where prompt decision by the Commission is necessary to prevent detriment to the public interest. In such instance—that is this instance—the matter shall be referred forthwith, that is during the course of the hearing, by the presiding officer to the Commission for determination.

Presiding Examiner: It is apparent that you and I do not have the same understanding, then, of 1.28(a).

Call your next witness, Mr. Rosenman.

* * * * * * *

[fol. 4043] Cross examination.

By Mr. Hobbs:

Q. Mr. Ketchen, yesterday afternoon you gave me a summary sheet of your cost estimates with respect to Exhibits 161 and 165, totaling $18,698,000 for Exhibit 161, and $21,946,000 for Exhibit 165.

Now, do your cost estimates with respect to Exhibit 161 include transmission lines?

A. No, they do not.

Q. Do your cost estimates with respect to Exhibit 165 include transmission lines?

A. No, they do not.

Q. So that these figures you just gave are in addition to your figures that you gave with respect to Exhibit 161 and 165?

A. That is correct.

Q. Now, I am not entirely clear as to just what your investigation had been with respect to relocating the pumpback reservoir for the project. Was your investigation limited to a study of the locations covered by Exhibits 161 through 165?

[fol. 4044] A. No, we considered other schemes but abandoned them quickly because of the obvious infeasibility of them.

Q. By that do you mean that because of space, or just what do you mean?

A. One of the schemes that was considered as an alternate beyond those that we have shown here in the exhibits was the so-called "dumbbell type" of scheme in which an isolated body of water would be located at some distance from the main reservoir body and connected by a canal. While that is feasible in one sense, when we came to examine the ground locations we found that it was not feasible to take either area for storage volume to provide the necessary storage. And furthermore, we found that the head loss in the canal connecting the two would be very high.

* * * * * * *

[fol. 4048] J. Russell Thorne was called as a witness and, after being first duly sworn, was examined and testified as follows:

[fol. 4049] Direct examination.

By Mr. Rosenman:

Q. Will you give your name and address?

A. J. Russell Thorne.

Mr. Lazarus: Will you speak up, please?

The Witness: J. Russell Thorne.

By Mr. Rosenman:

Q. What is your business, Mr. Thorne?

A. Real estate appraiser and real estate broker.

Mr. Rosenman: Mr. Examiner, his qualifications are in the record at the old hearing. If there is desire for it, we can have them repeated.

Presiding Examiner: Do you concede his qualifications?

Mr. Lazarus: Yes, sir.

By Mr. Rosenman:

Q. I show you Exhibit 165 and ask you whether you have made a study of the land covered by a pink portion thereof which is the ultimate reservoir?

Mr. Lazarus: I object to this line of testimony, Your Honor. Alternate sites are not before the Commission for determination. The only reservoir that is before the Commission for determination or consideration is the one shown on Exhibit No. 161.

Presiding Examiner: Objection overruled.

The Witness: I am familiar with this—

[fol. 4050] Mr. Lazarus: It is understood, now, my objection runs to all testimony with regard to alternate sites, and all testimony with regard to relative costs of alternate sites?

Presiding Examiner: Then, Mr. Lazarus, at the conclusion of the direct testimony I will hear you on a motion to strike exhibits and testimony if you wish to be heard then. But in the meantime, your objection runs.

By Mr. Rosenman:

Q. Will you state, were you requested by the Power Authority to make an estimate of the value of the land contained within that alternate site area, just the pink portion thereof?

A. Yes, sir.

Q. And will you state briefly what you did in order to make such an estimate?

A. Well, we traveled all over the area and observed the buildings from the outside. We did not have time enough to examine them inside.

Q. And what was the estimate that you arrived at for that entire area?

A. Well, the estimated cost of the land and buildings, cost of acquiring them, is $12,880,000.

Mr. Rosenman: That is all, sir.

Mr. Lazarus: This being the conclusion of the direct testimony, I move that the testimony be stricken because the issue before the Commission and before Your Honor is [fol. 4051] whether the license will interfere or be inconsistent with the purpose for which the Tuscarora Reservation was created or acquired. The witness' testimony has absolutely nothing to do with the Tuscarora Reservation. Therefore, it is quite outside the scope of this hearing.

irrelevant and immaterial. I therefore move that the testimony be stricken.

Presiding Examiner: I will reserve the ruling on your objection until the conclusion of the Power Authority's direct testimony of all witnesses. Whenever they rest their case, then I will hear you.

Is there cross-examination of this witness? Does staff have cross-examination?

Mr. Hobbs: Yes, sir.

Cross examination.

By Mr. Hobbs:

Q. Mr. Thorne, I believe you testified to the figure of $12,880,000 with respect to land and buildings. Now to what does that relate, to what exhibit?

Mr. Rosenman: 165.

The Witness: Exhibit 165, yes.

By Mr. Hobbs:

Q. Where does that appear on Exhibit 165?

A. Sir?

Q. Where does that appear on Exhibit 165?

A. This is the pink area as defined on this map. It is [fol. 4052] colored pink.

Presiding Examiner: Any other questions?

By Mr. Hobbs:

Q. Can you describe the buildings—

Mr. Hobbs: I understand we have another witness covering that.

Mr. Rosenman: He knows it.

By Mr. Hobbs:

Q. Can you describe the buildings covered in that figure?

A. There are 445 buildings in this area, mostly residences of medium price, $12,000 to $18,000—most of them. There is

quite a large school and a church and there are two cemeteries which have buildings on them, I mean like a chapel building in one, and I think just equipped buildings in the other—

Mr. Landy: We cannot hear the witness.

Mr. Hobbs: Would you speak a little louder, please, Mr. Thorne?

The Witness: The buildings are mostly residential. There is a church and a school and two buildings in cemeteries, which I just described. The type of residence, well, the age of the residences, is quite recent. They have mostly been built in recent years.

Mr. Hobbs: Mr. Examiner, I have a little problem here. I think probably we can save time if we let these witnesses testify on direct. Apparently there is a little bit of over-[fol. 4053] lapping in testimony, and some of them are going to testify on direct with respect to detail, and others as to conclusions as to certain matters from those details. Perhaps if we get all the direct on we could save time and shorten the cross-examination. I do not think we serve too much purpose by having material in the record twice here.

Presiding Examiner: I do not understand what you mean. You mean you are not prepared to cross-examine this witness at this time?

Mr. Hobbs: I understand we are going to have another witness testify on direct with respect to these details, and if that is true—and it is also true, I understand, in some other fields—and if we get all the testimony in on direct, I think we can shorten the cross considerably.

Mr. Rosenman: I wanted to say to Mr. Hobbs this witness is the real estate expert, and he is the one to testify as to value. He has his worksheets that indicate the value of these buildings, and the cemetery and so forth. He is the man to cross-examine on value. I just asked him as to total value. If you want any details, he is the man who can furnish them.

Presiding Examiner: Does that answer your question?

Mr. Hobbs: Except that I understand we have another witness who is going to give the details, and we can refer back to those details and shorten the cross-examination.

[fol. 4054] Presiding Examiner: You can step down then, and we will hear the other witness.

Mr. Rosenman: I think Mr. Hobbs misunderstands. We are going to introduce pictures of each of these buildings, and we are going to have the man who counted the buildings. But so far as the real estate value is concerned, Mr. Thorne is the head of the appraisal service.

Mr. Hobbs: I understand that.

Presiding Examiner: Mr. Thorne, let me ask you, have you separated the appraised value of the real estate from the buildings located thereon?

The Witness: No, sir. When we made this estimate, we estimated the land and buildings as a single item.

Presiding Examiner: As a separate unit, as a single unit?

The Witness: That is correct.

Presiding Examiner: And there are how many buildings on the—

The Witness: There are 445 buildings.

Presiding Examiner: Did you make the appraisal of the proposed taking of the reservation property?

The Witness: We have made an estimate of that. We never have appraised it.

Presiding Examiner: How many buildings are located on that?

The Witness: I think there are 37 houses.

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[fol. 4055] WALTER A. PRINTUP was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

[fol. 4056] Q. Is your title Chief Printup?

A. That is right.

Q. Chief, you are a member of the Tuscarora Tribe, are you not?

A. Right.

Q. And are you the clerk of the tribe?

A. That is right.

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[fol. 4080] Q. Could you sell your land to someone else?

A. If it is a tribal member, yes.

Q. You can sell it to the other member?

[fol. 4081] A. Yes, tribal member.

Q. And does he pay you for the land? Does he pay you money?

A. Well, whatever we agree to do. It is an agreement.

Q. And is that done frequently on the reservation? Do you keep a record of that or does someone else keep a record?

A. Well, I just read the record here.

Q. It is in the minutes of one meeting that we read into the record, isn't it?

A. Yes.

Q. Are there other instances like that in the minutes?

A. Yes, yes.

Q. Will you look and see whether you can find some? The last one we found was November 11th.

Mr. Lazarus: I will be willing to stipulate that members of the tribe transfer land back and forth.

The law as to the status of the land is quite clear and it is not an evidentiary matter.

Mr. Rosenman: You stipulate that as a matter of practice they transfer land from one to the other?

Mr. Lazarus: From one member of the tribe to another member of the tribe.

Mr. Rosenman: For cash or for other considerations?

Mr. Lazarus: Yes.

Mr. Moore: How long do they keep it?

[fol. 4082] The Witness: Until the title is transferred to some other tribal member.

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[fol. 4089] Mr. Rosenman: There is one other question I would like to ask or maybe Mr. Lazarus would stipulate it.

That, in addition to this land being transferred from one allottee to the other, that if an allottee dies, that the land descends to his next of kin.

Mr. Lazarus: That is correct, isn't it?

The Witness: Yes.

Mr. Lazarus: Yes.

Mr. Rosenman: And could we have a stipulation that the power so to descend has been adjudicated in the New York courts?

Mr. Lazarus: Yes. That is a matter of judicial notice.

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[fol. 4091] Cross examination.

By Mr. Chace:

Presiding Examiner: Chief, if you know, you tell him. Do you rent tribal lands to white men to farm?

The Witness: Do you rent?

By Mr. Chace:

Q. You have already testified—

A. Yes.

Q. —that there are lands rented to white men, haven't you?

A. Yes.

Q. Now, is that contrary to the tribal custom to do that?

A. Well, the Indian has the free use and enjoyment of this reservation.

Q. So he can allot his land to a white man to farm if he wants to, is that right?

A. Well, they have been doing it.

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[fol. 4092] Elton Greene was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Chief, you are the Head Chief of the Nation, aren't you?

A. President of the Chiefs Council.

Q. That makes you the Head Chief, is that what you are called?

A. You call it that, yes.

Q. Is that what you call it, Head Chief?

A. We call it President or Chairman of the Chiefs Council.

Q. As Chairman of the Chiefs Council, you are familiar with the way the tribe is run, are you not, the management of the Nation, I mean?

A. Yes, I should.

Q. The administration of the Nation?

A. I should, yes.

Q. How long have you been the President of the Chief Council?

A. Since 1947.

. . . . . .

[fol. 4094] Q. Do you know yourself, Chief, how many white people live on that reservation today?

A. What do you mean by asking—living in their homes, or what?

Q. Well, first, let's take are any living in houses on the reservation.

A. There is probably very few that would live in a house.

Q. How many?

A. I don't know.

Q. Are there some?

A. There are some, yes.

Q. That live in their own house?

A. No.

Q. I mean a house which is rented to them.

A. Rented to them by another Indian.

Q. And are there some that live in trailers?

A. There are some just coming in recently.

Q. Weren't there some old trailer camps, Chief, before this project was started?

A. There was one trailer camp there.

Q. How many trailers were on that trailer camp, do you remember?

[fol. 4095] A. Well, it varies. You never can keep track of one because they are coming and leaving.

Q. Was there just one trailer camp before the Niagara Project was started?

A. That is right.

Q. Whereabouts was that on the reservation?

A. That is on the Chew Road, on the Indian reservation.

Q. How many trailer camps have come in recently?

A. That I coulda't tell you. They are just coming in and we have appointed two Chiefs to look after that.

Q. When you say "look after that," what do you mean, Chief?

A. There is a committee on that to investigate, investigators.

Q. And who collects the rent from the people who bring their trailers in?

A. The landlord collects that.

Q. The Nation doesn't collect it, does it?

A. They collect only a dollar a month in each trailer that comes in.

Q. The Nation gets $1.00 a month?

Mr. Printup: We haven't got it yet.

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[fol. 4097] Q. As I understand it, the common land, what you refer to as the common land—meaning the land that has not been allotted to any member—

A. Yes, that is right.

Q. —you have been in the custom of allotting two acres every time a Tuscarora is born, is that right?

A. No, when he becomes of age.

Q. When he becomes of age?

A. Yes.

Q. Then he is an allottee of two acres of land?

A. Yes, and he has the privilege, if he wants to use it, [fol. 4098] for his home, or he has got rights to sell it to another tribe. That is something that we do on the reservation. We deal one with another. He can keep that.

Q. You said "another tribe." Do you mean that?

A. No, no, to other members of the tribe.

Q. The same tribe?

A. Yes, the Tuscaroras.

Q. I thought so. And he can then do with the land what he wants?

A. That is right.

Q. And you say the only land that is now left that is what you call common land is land which is wooded and you use for timber?

A. Yes.

Q. What about the swamp land on the reservation?

A. The swamp land is about the same principle there. I do not know how many acres that would be.

Q. But that is common land?

A. That is common land.

Q. Outside of that swamp land, Chief, can you tell us how many acres are still common land?

A. I couldn't off hand.

I couldn't tell you how many acres.

Q. Approximately, could you say, not exactly, but approximately?

[fol. 4069] A. When you go into the woods and look around and it is pretty hard to guess it. You can guess an open field, about how many acres, but in the woods, I couldn't even guess.

Q. Is there any open land that is good for agriculture which is still common land?

A. No, there isn't any.

Q. The only common land that is left is wooded land?

A. Yes.

Q. And the swamp, is that right?

A. That is right.

Q. Now, what other record—I'm sorry, I started to ask you about who keeps a record of how much land is allotted to each member? Is there any way that I could find that out from any records?

Aren't there any records?

A. I do not hardly think so.

Q. Isn't there any record that shows how much land Mr. Printup owns or how much you own, or Chief Patterson, in any one book?

A. No, because we trust in one another of the lands that we keep. I trust that we know who owns the land, but we do not keep the record of how many acres in such a land.

For instance, I know where Mr. Patterson owns it, I know where Chief Printup owns the land, and I know where his home is and that is the same way with mine.

[fol. 4100] Q. But isn't there a record of it someplace?

A. No.

Q. In writing?

A. We do not keep records on that, only some has a record on this in the record. There are some in the record of transactions, of transfer of lands. We have some records of that in the book.

Q. Who keeps those records?

A. He does.

Q. Mr. Printup?

A. Yes.

Q. He told us that he did not have those records.

A. It would be very few that would be transferred into this to be recorded, very few, but they do not have to, if they don't want to.

Q. You mean you trust each other?

A. Absolutely.

Q. As to what the area of the land is?

A. Absolutely.

Q. If one of the members were to die, that land goes to his wife and children?

A. That is right, inherited right.

Q. And is there any record kept of what land they own?

A. No, not that.

Q. Have there been disputes between members of the [fol. 4101] tribe as to who owns what?

A. Not—very little about that in the last ten years.

Q. And who settles those disputes?

A. The Chiefs.

Q. The Chiefs Council. One of these cases went to the courts, didn't it; Chief Patterson's case went to the courts, didn't it?

Mr. Lazarus: I thought we had already stipulated to that.

By Mr. Rosenman:

Q. Chief, are there any other books that are kept about the reservation other than the books that Mr. Printup has and the books that Mr. Hill has?

A. There is another book that is an enrollment book, that is all, the enrollment book.

Q. Mr. Hill has that?

A. Yes, the agency.

Q. Do you know, Chief, how many other Indians, other than Tuscaroras, live on your reservation?

A. It has been mentioned 180 that are non-members of the Tuscaroras living with the Tuscaroras. That is the question you asked?

Q. That is right.

A. About 180.

Q. Do they live in houses by themselves?

A. Oh, yes, some of them, yes.

[fol. 4102] Q. Now how many white men? You don't know how many white men live on the reservation, do you, in trailers, or in houses?

A. No, I have no record, I have no knowledge of that at all.

Q. Any idea?

A. No.

Q. They do not have to register any place, do they?

A. No.

Q. Do you know, or is there any record any place of how many farms there are on the reservation, how many acres of farms?

A. I do not know if you would call it farms. There is about—just an estimation—I would say farm lands on the reservation would be between seven and eight hundred acres of farms—more than that. But we have got over 30 tractors, and every one of those are farming to some extent. Now, I have got a tractor and I farm about 12 or 15 acres.

Q. And do you know how many acres Chief Patterson has?

A. No, I would not know how many he has got.

Q. You do not know how many acres anybody else has?

A. No, no, not farm lands.

Q. Did I understand you to say that 700 acres were farmed?

A. No, no. In the rear of that 1300 acres is over 700 [fol. 4103] acres of farm lands that I have been investigating about.

Q. How about the acreage of farm land in the rest of the reservation?

A. That I couldn't tell you.

Q. Do you know how many members of the tribe work outside the reservation in different areas?

A. No, I couldn't give that. I wouldn't know.

Q. You have no idea how many?

A. No, I wouldn't know.

Q. Do you know that some of them work off the reservation?

A. Oh, yes, quite a few work off the reservation, and some of those that have farms, that have small farms, they operate besides working outside.

Q. Do you know whether all of Chief Patterson's land is on the reservoir area or is some of it outside the reservation?

A. Every bit of it, I know that.

Q. Every bit of his farm is on the reservoir area, is that right?

A. That is what I understand.

Q. Does the Nation itself get any income from this land which is allotted?

For example, the land that you have, do you pay the Nation any income for that, any rent?

[fol. 4104] A. No, no.

Q. Who keeps track of the treasury of the Nation?

A. Who is the treasurer?

Q. Yes.

A. Chief John Hill.

Q. Is that the same man that keeps the enrollment book?

A. That is right.

Q. Can you tell us how much cash is in the treasury of the Nation?

A. No, I could not tell you.

Q. Does he know?

A. Yes, absolutely.

Q. Do you know anything about white men who farm on the reservation?

A. Leasing lands for farm purposes, you mean?

Q. Either lease or oral lease.

A. Or rent?

Q. Or rent, yes.

A. Yes, I know.

Q. Do you know whether the names that I read to Mr. Printup, whether they lease land on the reservation?

A. I can tell you practically only one farmer that leases my land. That is the only one that I know.

Q. What is his name?

A. His name is Max Haseley.

[fol. 4105] Q. And he leases lands from you, doesn't he?

A. Yes, on a yearly basis.

Q. Do you know how many acres he leases?

A. Around 50 acres.

Q. Would it refresh your recollection if I tell you that he has an affidavit that he leases 244 acres?

A. It couldn't be all from me. Maybe he leases from somebody else.

Q. Who is Mrs. Andrew Printup? Is she a member of the tribe?

A. Yes, she is a member of the tribe.

Q. Is Doris Printup a member of the tribe?

A. Yes, she is a member of the tribe.

Q. Truman Johnson?

A. He is a member of the tribe.

Q. He says he leases 244 acres from all of you, is that about right?

A. It could be. It is possible.

Q. He also says that he leases some from the Tuscarora Nation.

A. He just leased that recently. We haven't given him any agreement on it yet. He just started to use it.

Q. How many acres?

A. 29 acres.

Q. Is this part of the common land you talk about?

[fol. 4106] A. No, that is what we call the Nation farm.

Q. The Nation farm?

A. Yes.

Q. And how many acres of that?

A. 129 acres.

Q. Has he taken the whole farm, Mr. Haseley?

A. Yes, he has taken the whole business.

Q. In other words, you have leased to Mr. Haseley all the common land that was left?

A. Not the common land, but the Nation farm.

Q. Isn't that the same as the common land you talked about?

A. No, we do not call it that at home.

Q. You call it the Nation's farm?

A. Nation's farm.

Q. But this lease to Mr. Haseley covers all that was left of the Nation's farm?

A. He takes it all, yes.

Q. Does anybody else farm the Nation's farm or any part of it?

A. No, not now, no. That is the only Nation's farm we have got on the reservation.

Q. And you leased it all to Mr. Haseley?

A. Yes.

Q. Is that right?

fol. 4107 | A. That is right.

Q. Do you know a Mr. Hubert Haseley?

A. I do not know him. I do not know him. I might know him by sight, but I do not know him.

Mr. Rosenman: May I ask that this map be marked for identification?

Presiding Examiner: Judge, it will be marked Exhibit 169, and will you describe it, please, for the record?

Judge, it has just been called to my attention I marked that 169. Let me change it to 168.

(The document referred to was marked Exhibit 168 for identification.)

Mr. Rosenman: 168 for identification, Mr. Examiner, is an aerial map entitled "Fields Leased by Non-Resident Farmers," with a legend in the lower right-hand corner. This is a mosaic map of the entire reservation, including the part taken by the Authority, proposed to be taken by the Authority, and the part not taken.

By Mr. Rosenman:

Q. As I understand it, Chief, this blue line, the blue lines represent the part taken by the Power Authority from the reservation, and the red lines show the entire Indian reservation insofar as this area is concerned, is that right?

Do you know? Can you tell from this? That is a statement I am making to the Examiner, then.

[fol. 4108] Mr. Moore: The part taken is indicated by both the blue and red lines.

Mr. Rosenman: The red line, Mr. Examiner, constitutes the boundaries of the reservation, and that part of the reservation which is within the red line, but bounded by the blue line, is the part which is being taken for the reservoir.

By Mr. Rosenman:

Q. Can you point out there the lands that Mr. Max Haseley farms?

Can you tell from the map?

A. If I put my glasses on.

Q. Take your time.

A. All I can tell you is this here, that is part of the Nation farm.

Q. One of the yellow spots numbered "7"?

A. That is right.

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[fol. 4112] Q. Now, Chief, do you remember in this year, in March, the Niagara Mohawk Power Corporation getting a transmission line right of way over the Tuscarora Reservation?

A. Oh, yes.

Q. Did you handle that?

A. Yes, we all handled that, the chiefs handled that case.

Q. And do you know how wide their right of way was?

[fol. 4113] A. To tell you the truth, I could not tell you. 180 feet, something like that.

Q. Something like—

A. Something like a hundred feet.

Q. 100 feet. And that was to carry power from Niagara Falls to Model City, wasn't it?

A. That is right.

Q. And it was an easement, right of way, over your land, wasn't it?

A. Yes.

Q. Do you know how long that was for? Was it ten years?

A. Ten years easement.

Q. Now this agreement was made between the Niagara-Mohawk and Chiefs Elton Greene, Arnold Hewitt and Walter Printup, was it not?

A. It must be in the record. I do not recall that.

Q. But you were one of them?

A. I was one of them, yes.

Q. It went over your land, didn't it?

A. Not on my land, no. On the Tuscarora Reservation.

Q. Now did the Niagara Mohawk Company also make an agreement with some of the people whose land it went over?

A. That is right.

Q. Was Chief Harry Patterson one of them?

A. Yes.

fol. 4114 Q. Do you know whether that agreement was submitted to the Secretary of the Interior?

A. No.

Q. It was not?

A. No.

Q. It was not submitted?

A. No.

Q. Was it submitted to anyone in the Federal Government?

A. No.

Q. Do you know how much was paid for that?

A. I do not recall that part.

Q. Don't you know how much

A. I haven't got a record of that myself.

Q. Don't you know how much the Nation got?

A. I don't recall that, just what it was. Around $3,000, something like that.

Q. $3,000. And how much did the owners of the land get?

A. I don't know what they got.

Q. Do you know how much Chief Patterson got?

A. No, I don't.

Q. You did not concern yourself with that?

A. I did not concern myself at all on that part.

Q. They kept the money, didn't they?

A. Yes.

Q. And the only money that the Nation got was the $3,000?

[fol. 4115] A. Yes.

Q. Can you tell us what happened to the $3,000?

A. Put that in the treasury.

Q. Is it still in the treasury?

A. I don't know. I haven't got the record of the financial at all.

Q. Do you mean to say as Chief you do not know whether or not—

Mr. Lazarus: Can you tell us the relevance of the tribe's disposition of its own money to the issue before the Commission?

[fol. 4116] Mr. Rosenman: I am inquiring to see what disposition they made of this land. This is an easement given without any authority from the Federal Government, or even notice to the Federal Government, and I would like to find out, not only what they did with the land but what they did with the proceeds.

Mr. Lazarus: Let's stipulate that the lease was illegal.

Mr. Rosenman: I beg your pardon?

Mr. Lazarus: Let's stipulate the right of way was illegally entered into.

Mr. Rosenman: I press my question, sir.

Presiding Examiner: You are stipulating to what, Mr. Lazarus?

Mr. Lazarus: I would be willing to stipulate that the lease was entered into in violation of 25 USC 177.

Presiding Examiner: Objection overruled.

By Mr. Rosenman:

Q. Do you know what happened to that money?

A. No. No.

Q. You mean to say, Chief, that you, as the chief of the tribe, do not know what happened to $3,000 that went into your treasury?

A. We have expenses on our reservation. I don't doubt but it was used for our current expenses of the tribe. I don't doubt one bit it has been used for that.

Q. What current expenses do you have?

[fol. 4117] A. Oh, we have quite different things on this reservation and—

Q. Name some of them.

A. Well, for instance, the upkeep of the few things on the reservation, and we pay very little to the secretary and all different—When they do anything for the nation, we pay for those things, pay expenses for coming down here—one of the main things we pay expenses for now is coming over here.

Q. Now, this $3,000 you got only last March. Don't you know what happened to that?

A. It must be in the treasury. I don't keep track of that. That is not in my jurisdiction.

Q. You mean to say the money just comes in and you know nothing about it?

A. Well, they turn it over to the treasurer and he keeps track of that.

Q. And you don't know anything about it?

A. No.

Q. Who has the authority to spend money that belongs to the nation?

A. Well, it is the treasurer.

Q. Can he spend money without talking to you?

A. In some cases, where we know that it has to be spent—

Mr. Lazarus: I repeat my objection: What the nation does with the income of the nation has absolutely nothing [fol. 4118] to do with the issue before this court.

Mr. Rosenman: This is not income, Mr. Examiner. This is the sale of assets of the nation.

Mr. Lazarus: This is income.

Presiding Examiner: Well, Judge, he said he did not know what became of the money, and we may be able to determine that from another witness if it is relevant.

Mr. Rosenman: Well, I do not know what other witness. This is the chief of the nation. I would think that $3,000—

By Mr. Rosenman:

Q. Do you get $3,000 very frequently for the nation?

A. No. No, that was the first time.

Q. This was a big sum, wasn't it? This was a big sum?

A. I don't think so at this time of year, I mean, at this age.

Q. But it is big for the nation, isn't it? Have you any idea how much money is in the treasury now?

A. No, I haven't the least idea.

Q. You never asked?

A. I never ask. I never inquired because I know it is taken care of.

Q. You have been chief 13 years, and you have never asked how much is in the treasury?

A. No, I don't bother about it. We have reports every year. We have reports every year of what was expenses [fol. 4119] during the year, and what is paid out, and what income has come in during the year, and so on. And we have the recording of the treasury on that part.

Q. Which books would those reports be in?

A. That would be in the treasurer's book.

Q. It would not be in Mr. Printup's book?

A. No, I don't think so.

Q. When was the last report made?

A. It was made in the spring, about in the last week of April. Somewhere like that.

Q. And you don't remember how much was in the treasury?

A. No, I don't pay any attention to that.

Q. Now, do you know of any other occasions where the Niagara Mohawk got the same sort of right of way?

A. That is before I became a chief. That was about 15 years ago they came through there. It was the T.N.T. plant —down to Model City.

Q. And do you know whether they did it a third time? They have three easements through your reservation, don't they?

A. I only know of two of them. I have been chief only since '46, and before that time I do not know what took place.

Q. Do you know whether there are any railroads across your reservation?

A. Yes.

Q. The Lockport and Niagara Falls Railroad Company [fol. 4120] crosses it, doesn't it?

A. Not now, no.

Q. What is it called? What is the railroad called?

A. Rome and Watertown, that crosses part of the reservation at the northwest corner.

Q. The northwest corner?

A. Yes, northwest corner.

Q. Which railroad was that?

A. The Rome and Watertown.

Q. Which?

A. Rome and Watertown, about a couple of thousand feet that crosses there.

Q. What about the New York Central?

Mr. Moore: That is the same thing.

[fol. 4121] By Mr. Rosenman:

Q. Now do you know how many New York telephone companies lines cross your reservation?

A. How many lines? I could not tell you that.

Q. Have they built any recently?

A. For instance, how long back are you referring?

Q. I do not know. Do you remember what is the most recent telephone line that they built across the reservation?

A. I could not tell you how long that was, but they have put lines in there.

Q. And do you know whether the Federal Government was involved in that?

A. I could not tell you that.

Q. What about the highways that go through, do you know how many highways have been constructed by the State through the reservation?

A. The State highways are mostly always approved, but all major—

Mr. Lazarus: May we have a statement from counsel as to the purpose of all this questioning?

Mr. Rosenman: It is our intention, sir, to show that none of these had any Federal authorization, such as is claimed is necessary here.

Mr. Lazarus: We have the ruling from the Court of Appeals from the District of Columbia circuit which says the [fol. 4122] consent of the United States is necessary for the alienation of land within the Tuscarora Reservation.

I move we strike any testimony with regard to alienation that may have been in violation of law.

Mr. Rosenman: Well, if we will have a concession these were in violation of law, and that the Federal authorities were not involved, I will take that.

Mr. Lazarus: As long as Federal consent has not been had to the taking of land within the Tuscarora Reservation, it is in violation of law, according to two Courts of Appeals decisions.

Mr. Rosenman: Can we have a concession that applies—

Mr. Lazarus: I will rely on the Court of Appeals decisions.

Mr. Rosenman: Can we have a concession that applies to the telephone company, and to the highways, as well as the railroads and the Niagara Mohawk?

Mr. Lazarus: There are special provisions with regard to certain rights of way across Indian lands.

Mr. Moore: None of them apply in New York State though.

Mr. Rosenman: What I am talking about, though, is solely Federal intervention, nothing to do with State. I just want a stipulation this was done without any authority from any Federal agency.

Mr. Lazarus: The issue in this case is whether—

Mr. Rosenman: Can't we get a stipulation, either yes or no?

Mr. Lazarus: The answer is you will not get a stipulation [fol. 4123] as to matters about which I do not know. That is the answer.

Presiding Examiner: The witness may answer the question.

Mr. Rosenman: I beg your pardon?

Presiding Examiner: You had a question pending before the objection, I overruled the objection, and told the witness that he can answer the question.

By Mr. Rosenman:

Q. You answered about the highways. Do you know whether the Federal Government took any part in that?

A. Am I permitted to explain the situation of the highway on the reservation?

Q. Surely.

A. All right. Any major repairs, the Western District generally will come out there and ask the Chief's permission to make major repairs, or a new road to come in through there, through the Chief's counsel, and we grant them, and even specify the width of the road.

Q. That is all that is done, you grant the permission, is that right?

A. The permission, that is right.

Q. You don't go to the Federal Government, do you?

A. No.

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[fol. 4132] Cross examination.

[fol. 4133] By Mr. Lazarus:

* * * * * * *

Q. I see. Is there land available to allot to these people if they want it?

A. I imagine it would be, and we haven't got much left of what we call the common lands. We will soon be running out.

Q. I see. Is the land that is available for allotment useful land?

A. No.

Q. Do you think the Nation could use more land outside the reservation?

A. The Tuscaroras could use quite a good size country in their days for hunting. I do not see why we cannot use any more land now—

* * * * * * *

[fol. 4135] Q. In the affidavit of Max Haseley, which is Exhibit 169 for identification purposes, it is stated that Max Haseley leases land from you. Is that correct?

A. That is correct.

Q. It is also stated that Mr. Haseley has a written lease from you for a term of five years, is that correct?

A. One year with the privilege of five.

Q. What do you mean by one year with a privilege of five?

A. We renew every year.

Q. I see.

A. With a six months notice. If I want him to vacate, or if he wants to quit farming, he will give also six months notice.

Q. Now one final set of questions, Chief Greene.

I would like to show you again Exhibit No. 168.

A. May I turn this around?

Q. Yes, certainly. Now this is picture of the Tuscarora Reservation.

A. Yes.

Q. You see that there are various spots on the map marked in yellow, and they are supposed to represent lands that are leased by non-members of the Nation. Now I ask you to look on this map, in the area bordered in blue. Do you see that? That represents the 1383 acres that the Power Authority wants for reservoir. Will you [fol. 4136] tell me how many patches of yellow are in that area surrounded in blue?

A. Only a small one, one small one.

Q. One tiny little patch?

A. Yes.

Mr. Lazarus: No further questions.

Cross examination.

By Mr. Chace:

Q. Chief, you have testified that it was not necessary, although sometimes on Mr. Printup's books, on Chief Printup's books, records were made of transfers of property.

A. Once in awhile. Once in awhile.

Q. It was not necessary?

A. That was not necessary, no.

Q. Is that also true of transfers or leases to white men?

A. It is just the same thing.

Q. It does not make any difference whether it is an Indian or white man?

A. Let me give you an answer on that. Any white man leasing land for agricultural purposes that extends over five years, then the Chiefs have to approve of that. Other

than that, they do not have to approve. Because most of them are rented how I lease mine, one year with the privilege of five. One year at a time.

[fol. 4137] Q. Have the Chiefs approved of leases for over five years?

A. That is right.

. . . . . .

[fol. 4162] ROBERT W. HOPKINS was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Will you state your name and address to the stenographer, please?

A. Robert W. Hopkins, 909 Elmwood Avenue, Buffalo, New York.

Q. What is your business, Mr. Hopkins?

A. Real estate appraiser.

Q. Will you state some of your qualifications and experience as such?

Mr. Lazarus: I will stipulate his qualifications.

. . . . . .

[fol. 4166] By Mr. Rosenman:

Q. Did you make a survey and inspection of that part of the Tuscarora reservation which is to be taken by the Power Authority under the present plan?

A. Yes, sir.

Q. When did you do that?

A. The last time in October of this year.

Q. Will you tell us briefly what you did in order to make an appraisal of that land?

A. I flew over the land several times at as low an altitude as it was possible to go.

Q. In what kind of a vehicle was it?

A. I do not know the make of the plane.

Q. Was it a plane or a helicopter?

A. It was a plane, an airplane. And then I traversed all the public roads in the area four times in October and attempted to inspect 2 of the dwellings and was refused admittance.

Q. You mean the interior of the dwellings?

A. Yes, sir. So that my appraisal was actually made [fol. 4167] from computations on a large scale air map for land areas, and from exterior inspection of the houses and other buildings for the improvement values.

Q. Were you permitted to go near the houses for inspection on the exterior?

A. Only from the road, sir.

Q. And did you seek permission to do so from time to time?

A. In two instances, yes.

Q. Did you look at each house on the reservation, each dwelling on the reservation within this area?

A. Yes.

Q. How many are there?

A. Thirty-seven.

Q. Thirty-seven. And did you appraise each of those separately from the land on which they were located?

A. I estimated each separately. I was not able to get in and make a thorough appraisal.

Q. But your appraisal or estimate, whatever you call it, is separate for the building as distinguished from the land?

A. Yes, sir.

Q. Now what is the total of your appraisal?

. . . . . .

[fol. 4168] Q. What was the total value?

A. I valued the portion within the 1384 acres at $980,000 including the improvements.

Q. Have you filed an affidavit to that effect in the Western District Court of New York?

A. I believe such an affidavit has been filed.

Q. It is your affidavit, is it not?

A. Yes, it is my affidavit.

[fol. 4169] Q. What did you take into consideration in reaching that valuation?

A. I estimated my land values by comparison with sales of similar property immediately outside of the reservation, and I estimated the value of the improvements from the experience I have had in valuing many thousands of the dwellings.

Q. Do you have the value of the improvements separate from the total value?

A. Yes, sir. My value of the improvements is $334,500.

Q. And the rest is for the land?

A. The value of the land, $645,500.

Mr. Rosenman: That is all.

Presiding Examiner: Does Staff have questions?

Cross examination.

By Mr. Hobbs:

Q. What do those improvements consist of?

A. They consist of 37 dwellings, certain barns and small sheds and some greenhouses.

Q. How many barns did you find there?

A. Five.

Q. Were those located on five different farms?

A. Four different farms. One farm had two small barns on it.

Q. And what type of dwellings were on this land?

[fol. 4170] A. They were all frame dwellings. Some of them were rather nice older dwellings, some were rather nice newer dwellings and some were very, very poor shacks or shanties.

Q. Can you state generally about what per cent of which you found?

A. I have the itemized figures here that I put on each piece of improvement, each improvement, if you are interested in that.

The high improvement that I valued was a 2½-story frame house at $17,000 and the low figure that I put on any dwelling was $1,000.

Q. How many dwellings did you estimate the value to be less than $2,000.

A. Just two.

Q. How many less than $4,000, between two and four?

A. Ten.

Q. How many above $10,000?

A. Twelve.

Q. Those were all within the blue lines shown in Exhibit 168?

A. Yes, sir.

Q. What kind of utilities did you find?

A. The roads are in and they have electricity. There is no gas, no water except inkwell water, and no sewers but septic tanks, or dumping into ditches or fields.

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[fol. 4181] Russell J. Mulholland was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Will you give the stenographer your full name, please?

A. Russell J. Mulholland.

Q. What is your business, Mr. Mulholland?

A. I am engaged in the real estate appraisal business, being employed by the Thorn Appraisal Service, Inc.

Q. I am showing you Exhibit 165, which has the alternate area in pink. You are familiar with this exhibit, aren't you?

A. Yes, sir.

Q. And I am going to ask you about the houses contained in that alternate plot.

* * * * * * * *

[fol. 4187] By Mr. Rosenman:

Q. I show you an envelope, the envelope marked Exhibit 179 for identification, and ask you to state what the key map shows, and what the photographs therein show.

A. The key map shows an outline of alternate area on which has been superimposed the reference numbers appearing on the back of the pictures in such a manner as

to show in the direction from which the pictures have been taken.

Q. Would you say that these pictures taken all together show all of the houses within the alternate area?

A. I believe so.

Q. Do you know, off hand, how many there are, how many buildings?

A. Approximately 445.

Q. 445?

A. Yes.

Q. Do these pictures also indicate the cemetery?

A. Yes, sir.

Q. Do they indicate the school?

A. Yes, sir.

Q. And they indicate the various settlements, do they not?

[fol. 4188] A. Yes, sir.

Q. In other words, they indicate all the structures in the alternate site?

A. That is correct.

* * * * * * *

[fol. 4191]

Transcript of Hearing—November 26, 1958

HARRY PATTERSON was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Are you a Chief of one of the clans of the Tuscarora Nation?

A. I am.

Q. How long have you been a Chief?

A. Since '46.

Q. Since 1946?

A. That is right.

Q. Do you live on the reservation in the reservoir area or in the other part of the reservation?

A. In the reservoir area.

Q. And do you have property in the reservoir area?

A. I do.

Q. And do you have any property in the rest of the reservation?

[fol. 4192] A. I have some others, yes.

Q. How many acres of land do you have in the reservoir area?

A. Of my own?

Q. Your own land, yes.

A. 170 acres.

Q. And how much do you have in the rest of the reservation?

A. Thirty acres.

Q. Altogether you have 208 acres, is that right? You say you have 170 in the reservation?

A. In the reservoir.

Q. 170?

A. That is right.

Q. And you have 38 in the part of the reservation which is not covered by the reservoir?

A. That is right.

Q. Do you also lease some land from other members of the tribe?

A. I do.

Q. How much do you lease in the reservoir?

A. 407 acres.

Q. So that in the reservoir you have 577 acres that you operate as a farm, is that correct?

A. We operate 630 acres all told.

[fol. 4193] Q. All told?

A. Yes.

Q. What I want to find out is how many acres do you operate as a farm in the reservoir?

A. In the reservoir, 552.

Q. 552. Now, you said that you owned 170.

Does that mean you do not operate all of that as a farm

A. I operate, yes, that is my own land.

Q. As a farm?

A. Yes.

Q. That is 170 acres?

A. Yes.

Q. Then you say you lease 407 acres in the reservoir area from other members?

A. Yes.

Q. That is a total of 577, isn't it?

A. Yes.

Q. Now, what do you mean?

A. And I have 53 acres, also, in there.

Q. In addition?

A. In addition, yes, that we operate.

Q. In the reservoir?

A. In the proposed reservoir.

Q. Those 53 acres, are those under lease?

A. Well, it's members of my family, yes.

[fol. 4194] Q. Members of your family?

A. Yes.

Q. So that you and members of your family operate 170, which you own, is that right?

A. That is right.

Q. 407, which you lease from other members of the tribe?

A. That is right.

Q. And these 53 that members of your family own?

A. That is right.

Q. So that is a total of 630 acres?

A. Right.

Q. Is that correct?

A. Correct.

Q. That is in the reservoir area. Now let's go to the rest of the reservation. You say that you own 38?

A. Yes.

Q. Do you lease any land in the rest of the reservation?

A. No.

Q. From other members?

A. No.

Q. Do you operate those 38 acres as a farm?

A. Well, it is hillside. It is wood lots. It isn't tillable.

Q. Are all of the 630 acres that you operate in the reservoir area, is all of that tillable land?

[fol. 4195] A. Not altogether, no.

Q. How much of it is tillable, about?

A. With the exception of 23 acres.

Q. The rest is tillable?
A. That is right.

[fol. 4221] Q. And did the Niagara Mohawk construct transmission towers to carry their power lines across your land?
A. That is right.
Q. Do you remember there was a settlement with the Niagara Mohawk? They bought the right, didn't they?
A. That is right.
Q. And they paid you a certain amount of money and they paid the other owners a certain amount of money, didn't they?
A. That is right.
Q. Did they also pay the nation something separate and apart?
A. That is right.
Q. Do you know how much they paid the nation?
Chief Greene said it was $3,000, is that correct?
A. That is correct.
Q. Can you tell us how much you received?
A. I cannot recall just what it was.
[fol. 4222] Q. Can't you recall approximately what it was? It was only a few months ago.
A. Yes. The full figures I cannot say.
Q. I beg your pardon?
A. I cannot say full figures.
Q. Was it more than $100?
A. Oh, yes.
Q. Was it more than $1,000?
A. Yes.
Q. Was it $10,000?
A. No.
Q. Was it $5,000?
Was it around $5,000?
A. Around $3,000.
Q. It was $3,300, wasn't it, Chief?
A. Yes.
Q. Do you know what the other landowners got?
A. I haven't got the figures.

Q. Do you know the total that they paid the other land owners?

A. Yes, I do.

Q. What is the total?

A. I haven't got the figures with me. I didn't think that you would bring that question up.

Q. Does anyone in the court have those figures, do you [fol. 4223] know?

A. No.

Q. Could you get the figures?

A. Yes, I can.

Q. Will you bring them the next time you come to Washington?

Will you bring those figures and tell the Examiner what they are?

A. I presume I can.

Q. Did anyone decide how much the nation should get and how much the individual landowners should get?

Was that decided? Was that divided in some way? Who decided how much the nation would get, and who decided how much the landowners would get?

A. The Chiefs Council did.

Q. The Chiefs Council?

A. Yes, we decided how much we were going to ask for.

Q. Did the Chiefs Council decide how much you were going to ask for for your land?

A. No.

Q. You decided that yourself, you and the Niagara Mohawk met together and determined that, is that right?

A. They asked for the right of way, of course, with the privilege that they will settle with the landowners themselves.

Q. And did they?

[fol. 4224] A. They did.

Q. Each landowner made a separate bargain with the Niagara Mohawk.

A. In connection—I was the one that called the meeting of the landowners.

Q. How many were there?

A. I cannot just recall.

Q. You called a meeting of all the landowners, that this power line was going through?

A. That is right.

Q. And you decided how much you would all ask for in total?

A. That is right.

Q. And then how you would divide it?

A. Yes, per structure.

Q. Per structure?

What do you mean "per structure"?

A. Per structure of poles that is going to be erected on your land.

Q. I see, you would get so much for each pole.

A. That is right.

Q. And so all of you got the same amount for each pole?

A. That is right.

Q. And you do not know what that total was?

A. No, I do not.

[fol. 4226] Q. Isn't it fair to say, Chief, that you and your son, who helps you full-time are the only full-time farmers on the part of the reservation which is in the reservoir area?

A. Well, say that again.

Q. I say, isn't it fair to say that you and your son, the one son that helps you full-time, are the only full-time farmers on the reservoir area?

A. Well, all my sons pitch in and help.

Q. No, I am talking about full-time farming, spend all your time. You spend all your time at it, don't you?

A. That is right.

Q. And one of your sons does, also?

[fol. 4227] A. That is right.

Q. Now, all the other people that you have mentioned, who do farming there, only do it part-time, don't they? They work off the reservation, isn't that correct?

A. Yes.

Mr. Rosenman: Thank you, Chief.

That is all I have.

Presiding Examiner: Does Staff have questions?

Mr. Hobbs: Yes.

Cross examination.

By Mr. Hobbs:

[fol. 4230] Q. Have you, as either a member of the Chiefs Council or an individual landowner had any negotiations with the Power Authority with respect to the use of this land here for reservoir purposes?

A. No.

Q. You mean the Power Authority hasn't contacted you with respect to acquiring this land either as a landowner or as a member of the Chiefs Council?

A. Well, they came up with three of the committees and had a meeting and they came up, they wanted to acquire some land for a project, a power project, and we had a meeting, a general meeting, and they came up and said that they want to acquire some land.

Of course, they did not have no license, and after they get their license they will have to just sell bonds.

They did not have the money. Well, the meeting was held in a gymnasium. They threw it out, objected to it.

Q. Who threw it out?

A. The public, a public hearing we had.

Presiding Examiner: Chief, you mean by that that the Tuscarora people themselves threw it out, don't you?

The Witness: We brought that up before in our Council.

Presiding Examiner: But you had your meeting?

The Witness: The Chiefs Council.

Presiding Examiner: But this meeting in the gymnasium [fol. 4231] was of the Tuscarora Tribe, wasn't it?

The Witness: That is right.

Presiding Examiner: And then you turned down their offer?

The Witness: That is right.

By Mr. Hobbs:

Q. And when was this, Chief Patterson?

A. When?

Q. Yes, about when was this?

A. Oh, I cannot recall.

Q. Was this prior to the previous hearing almost a year ago?

A. Yes. It was the first meeting that ever was known to the reserve about the Power Authority.

Q. And have you had any other discussions since that time with respect to trying to reach a settlement as to the use of this land for reservoir purposes?

A. Well, there was another meeting. Of course, they only came up in brochures, open letters, and not a direct meeting across the table with our Chiefs Council. We never had a meeting of the Chiefs Council and the SPA.

Q. By that, do you mean you did not have any offer to consider?

A. That is right, and then again we had a meeting where they had a staff of officers here, that is, members of the SPA officers over to our auditorium in which they asked us what [fol. 4232] we wanted and that is all.

They didn't ask us what we want, but we couldn't come to any conclusion because they wouldn't commit to any settlement, commit to any price that they would pay.

Q. They have never offered the Tuscarora Nation any specific figure for the use of this land or the acquisition of this land.

A. That is right.

Q. As I recall, during the first hearing, from reading the record, the land had not been surveyed at that time. When was the Power Authority permitted to survey the land, do you recall?

A. I cannot just recall the dates.

Mr. Lazarus: That is a matter of public record. It was as a result of the court proceedings.

I will stipulate that the Power Authority was allowed to survey the reservoir area by virtue of an order of the United States District Court for the Southern District of New York entered approximately April 25.

I cannot swear to this. It was in the latter part of April of this year.

By Mr. Hobbs:

Q. Since the survey has the Power Authority made an offer to the Tuscarora Nation containing any specific figure for this reservoir land?

[fol. 4233] A. Well, as I said, we had a meeting in the auditorium.

The executive committee was there and we talked about it, but we never came to any figures they offered us and what we asked them.

They stated that if we get land adjacent to it, but we asked them if it will be tax-free land. They only recommend, but they couldn't guarantee it.

Q. Did they make any offer other than a land offer in exchange for land?

A. Not definitely.

Q. Not definitely?

A. Not definitely.

Q. Do you know what land they offered you?

Mr. Lazarus: Excuse me. The witness did not testify that they offered any land. He testified that the Tuscaroras asked for land.

Mr. Hobbs: I misunderstood the witness.

By Mr. Hobbs:

Q. Which land did you ask for, Chief Patterson, in exchange?

A. Pardon?

Q. Which land did the Tuscarora Nation ask for in exchange for this land that was in the reservoir area?

A. Any.

Q. Any land?

[fol. 4234] A. Outside the reservation, I said.

Q. Your counsel, as I understand him, has just stated that you asked for certain land. Now, what land did you ask for in exchange for the land in the reservation?

Presiding Examiner: Mr. Hobbs, the Chief testified that the Power Authority offered to buy land outside the reservation and exchange it for land within the reservation. The Chief said he asked if the land bought outside the reservation would be tax-exempt as is the land within the reservation.

The Power Authority said they could not guarantee it, but they would recommend it.

Now, as I recall, that is what the Chief testified to.

Mr. Hobbs: I so understood the testimony, but counsel for the Indian Nation seems to—

Presiding Examiner: Isn't that what you said, Chief?

The Witness: That is right.

Presiding Examiner: That is what I thought you said.

By Mr. Hobbs:

Q. Now, what land did the Power Authority offer you in exchange for the land within the Indian reservation?

A. They didn't specify any.

Q. Didn't specify what land it was?

A. No.

Q. Did it specify any acreage?

A. No.

[fol. 4235] Q. Any number of acres?

A. No.

Q. Have they ever offered you any specific sum of money since the survey in April, 1958?

A. Not that I recall.

Q. So that to date the Tuscarora Nation has never had any offer submitted to it by the Power Authority for either the purchase or the use of this land to be occupied by the proposed reservoir, is that your testimony?

A. Not across the table, only in brochures.

Q. In brochures?

A. Yes.

Q. What do you mean by that?

A. Open letters.

Q. Did they name any figure in those letters?

A. Well, I suppose there was, but we'd like to have a person make a bargain face-to-face.

Q. Do you mean they made an offer in writing to the nation? Is that what you mean?

A. In the book form that was sent out.

Q. Do you have a copy of the book here?

A. I do not know if I have one or not.

I do not know whether I brought one of them brochures. That one there.

Mr. Hobbs: I have a document of four pages printed on [fol. 4236] both sides entitled "Open Letter to the Tuscarora Indian Nation." I would like to have that marked for identification. I understand we will have additional copies later.

Presiding Examiner: That will be marked Exhibit 181 for identification.

(The document referred to was marked Exhibit 181 for identification.)

By Mr. Hobbs:

Q. Chief Patterson, I show you Exhibit 181 and ask you if this is the open letter or the brochure that you have reference to.

A. I cannot recall if this is the one. I'd have to look at mine, the one I have at home.

Q. Do you have a copy of yours with you?

A. No, I haven't. I didn't bring it.

Q. Have you ever seen this brochure marked Exhibit 181 before?

A. I cannot recall whether it is the same writing in there or what.

Q. What type of offer was made to the Tuscarora Nation by the brochure that you have seen?

A. They were willing to pay a thousand dollars an acre for the area.

Q. The area covered within the blue line shown on Exhibit 168, is that it?

[fol. 4237] A. Yes.

Q. And that is the only offer you know of that has been made by the Power Authority?

A. That is right.

[fol. 4242] Presiding Examiner: The Mohawk Power Company did not have to go to court to get a right-of-way?

The Witness: No.

Presiding Examiner: They came and sat down with you across the table and bargained it out, is that right?

The Witness: That is right.

Presiding Examiner: Now, then, this meeting that you had with the Power Authority of the State of New York in the gym, where they came and talked to the Tuscarora people, was that before this Exhibit 182 was issued?

The Witness: I can not recall when that was.

Mr. Lazarus: That is 182 for Identification only, is it not?

Presiding Examiner: That was before June 9 of this year?

The Witness: I would not swear to it.

Presiding Examiner: Well, as I gathered from your testimony here, you said that the reason that the tribe reached no decision at that meeting was because the Power Authority of the State of New York had said they did not have any money to pay you with then, that they would have to issue bonds before they could get the money. Was that [fol. 4243] why you turned them down then?

The Witness: No, our land was not for sale. Our reserve—we did not want to have any part—

Presiding Examiner: Have you since had any meetings with them?

The Witness: No.

Presiding Examiner: To discuss selling it?

The Witness: No. No, we have objected selling any part of the reservation. We can not sell. We can not, as an individual nation we can not, sell our land.

Presiding Examiner: Are you willing to sit down and talk across the table with them? I think you have indicated that the chiefs would talk with them if they would come and sit down across the table from you and bargain with you.

The Witness: No—I won't say on that.

Presiding Examiner: You do not want to say whether you would be willing to visit with them or not?

The Witness: No. But we can not sell, individual nations. That is against the rules of the Six Nation Confederacy. We can not sell land to a private concern.

Presiding Examiner: Well, O. K. Thank you, Chief. Your witness, Mr. Lazarus.

Cross-examination.

By Mr. Lazarus:

Q. Chief, when you granted an easement to the Niagara
[fol. 4244] Power Company, was that a sale of your land?
A. No.

Q. Did you give them any interest in your land? Did you give them any right in your land when you gave them that easement?

A. No.

Q. Was it just they were allowed to pass over the land?

A. That is right.

Q. This easement to Niagara Mohawk, did it require moving any houses?

A. No.

Q. Did it mean that you had to stop any of your farming operations?

A. No.

Q. Did anyone else have to stop farming as a result of it?

A. No.

Q. Did anyone have to move as a result of this?

A. No.

Q. Did this easement in any way interfere with your normal activities on the reservation?

A. No, not at all.

Presiding Examiner: Chief, there, what they did was come and cut a right-of-way across, cut down all the timber, didn't they, a strip across your property?

[fol. 4245] The Witness: Niagara Mohawk?

Presiding Examiner: Yes. Didn't they cut all the timber down to the ground?

The Witness: They have had, yes.

Presiding Examiner: How wide a strip?

The Witness: It is—I can not just recall. I would have to look.

Presiding Examiner: One hundred feet?

The Witness: I would not say.

Presiding Examiner: What kind of power poles did they put up, steel or wood?

The Witness: Wood. Temporary.

Presiding Examiner: Yes. But they cut down all of the timber and brush and everything, so that they just cleaned off a strip across your farm, didn't they?

The Witness: No.

Presiding Examiner: No?

The Witness: They came through my peach orchard.

Presiding Examiner: But where they went across land with timber on it, they had to cut the timber, didn't they?

The Witness: Oh, yes.

Presiding Examiner: They did not cut your peach trees down?

The Witness: No.

Presiding Examiner: O. K., Mr. Lazarus.

[fol. 4246] The Witness: I may retrace that statement. They did cut down about eight trees where the structure was.

Presiding Examiner: Where they are going to put a post?

The Witness: That is right.

[fol. 4247] By Mr. Lazarus:

Q. Chief Patterson, you operate a farm with your sons of about 620 acres within the taking area?

A. 630 acres, yes.

Q. 630. 170 acres of that is your own land, and the rest is leased land, or land belonging to members of your family, right?

A. Yes.

Q. About how many people live on this entire farm?

A. In the area or on the farm?

Q. Well, on the lands that you farm and in the area—let us say in the area. How many people?

Mr. Hobbs: In what area?

Mr. Lazarus: Well, first I will ask him in the area in which he farms, and the next question will be in the area of the taking.

By Mr. Lazarus:

Q. How many people on the area which you farm, including your own land and the leased land?

A. Well, I cannot say that. The total living on the area is 124.

Q. That is the area of your farm?

A. Yes.

Q. I see. About how many people live in the total 1,383 [fol. 4248] acres?

A. That is the area, the total area.

Q. Oh, the figure you gave me is approximately 123 people living on the 1,383 acres?

A. That is right.

Q. And is that in 37 houses?

A. That is right.

Q. Now, you have testified that in addition to your own farm there are five other farms in this area, one belonging to your son, Franklin Patterson; one to Joe Woodbury; one to Leroy Mt. Pleasant; one to Elon Crouse, and one to Hamilton Mt. Pleasant; is that correct?

A. Yes.

Q. Do you know of any other farms on the 1,383 acres?

A. No.

Q. Now, the people who live in those 37 houses, do they have garden plots which you would not call farms?

A. Well, that is included in that. They plant stuff, some of their residents plant stuff.

Q. My question is, in addition to these five people that I named and yourself, are there people who have garden plots on this 1,383 acres?

A. Oh, yes.

Q. Do they also have, some of them, a grapevine, a few grapevines?

[fol. 4249] A. Yes.

Q. Do some of them have a couple of fruit trees?

A. Oh, yes.

Q. Would you say that the people living in that area get some of their food from what they grow right on the land?

A. Oh, yes.

Q. The people in addition to those who have what you call farms?

A. Yes.

Q. Now, you have stated that you are a full-time farmer?

A. That is right.

Q. And that means you do not have any other kind of work?

A. No.

Q. Now, with respect to the other farmers who may have jobs in the city, can they take care of their farms in their spare time? In other words, in the time that they are not working in the city?

A. Yes.

Q. In other words, they grow as much as they want to grow in the time available to them, and also can find time to do work in the city?

A. That is right.

Q. This is true even though they are part-time farmers?

A. That is right.

[fol. 4250] Q. Now, looking at this exhibit in front of you —this is Exhibit No. 168—do you see the area marked with the blue line?

A. Yes.

Q. Now, that line represents the area for the proposed reservoir. Inside that blue line do you see any yellow patches?

A. One right there (indicating).

Q. That is marked with the "2". Is that a large patch or a small patch, compared to some of the other patches?

A. A small patch.

Q. I see. Do you happen to know who farms that tiny-little patch?

A. I do not know.

Q. Now, you have also testified that you have a sawmill, is that correct?

A. That is right.

Q. Now, with that sawmill you testified you cut lumber, am I correct?

A. Yes.

Q. And what did you use that lumber for?

A. I built my barn and I built the house. My children are building now with the lumber we get from it.

[fol. 4256] Mr. Rosenman: First, Mr. Examiner, I would like to read into the record what I think will be stipulated to in answer to your question of the witness about the condemnation of this right-of-way, or whether it was done by bargain and sale.

Presiding Examiner: This Niagara Mohawk

Mr. Rosenman: That is right. It was done by agreement, a copy of which we have printed, which is not necessary to [fol. 4257] put into the record. The date of it was March 17, 1958, and it was made between Harry Patterson and the Niagara Mohawk Power Company, providing for an H frame transmission line within the limits of 100-foot strip, and it was done pursuant to Section 17 of the New York Transportation Corporation Law, which under the statute has to be approved by a county court judge, and such approval was obtained and all of the material related thereto is in the Public Service Commission of the State of New York, Document 18879 of the year 1958.

Mr. Lazarus: I will stipulate to what was done, without stipulating to its legality under 25 U.S.C. 177.

* * * * * * *

[fol. 4267] Redirect examination.

Mr. Rosenman: I would like to have marked in evidence a photostatic copy of a newspaper, the Niagara Falls Gazette Publishing Corporation, certified by the Niagara Falls Publishing Corporation, which is the owner and publisher of the Niagara Falls Gazette.

The newspaper is dated March 7, 1957, and refers to this conference between Mr. Latham and the Chiefs' Council.

By Mr. Rosenman:

Q. Were you present then?

A. I cannot say.

Q. Well, you told Mr. Hobbs you remembered talking with Mr. Latham. Was this the occasion?

[fol. 4268] A. I cannot tell you. I have talked to him considerable times.

Presiding Examiner: It will be marked Exhibit 186 for identification.

(The document referred to was marked for identification as Exhibit No. 186.)

OFFER IN EVIDENCE AND OBJECTION THERETO

Mr. Rosenman: I offer it in evidence, Mr. Examiner.

Mr. Lazarus: Objection, Your Honor. This is now subject to two objections. One, it is certainly hearsay and not the best evidence in this situation; secondly, it has no relevancy to anything before this court. It relates, if anything, to a purported discussion in 1957, which has nothing to do with the purpose for which this reservation was established.

Mr. Rosenman: My chief purpose in putting this in is to establish the date, March 7, 1957, as appears on the certificate.

Mr. Lazarus: The date is equally irrelevant.

Presiding Examiner: Mr. Lazarus, I will overrule your objection and admit it at this time, subject to a motion to strike later on.

Mr. Lazarus: Is it admitted for the sole purpose, then, of saying—not for the truth of what is in it, but that there was a newspaper article on March 7?

Presiding Examiner: And it may refresh the witness' memory as to a meeting held about that time, or a dis- [fol. 4269] cussion about that time.

I do not think what the newspaper says is relevant.

Mr. Rosenman: This is in connection with the witness' own testimony of a meeting about this time and about the fact they refused to permit a survey.

Presiding Examiner: For that purpose, Judge, to refresh his memory as to the approximate date of his conversation with the surveyors, I think it is competent.

Mr. Lazarus: In that event, all we need is to have it marked for identification. We do not need it in evidence. He can read it without having it in evidence.

Presiding Examiner: I have admitted it subject to a motion later on if it is not relevant.

[fol. 4273] Mr. Rosenman: I would like to mark in evidence at this time the copy of the Niagara Falls Gazette, dated January 28, 1957—that is, one page of it, photostated—together with the certificate of the publisher that it is a true copy. And my purpose is to show that on this date, January 28, 1957, this entire project had become a matter of public property, including the reservoir and its approximate present location.

[fol. 4274] Mr. Lazarus: Are you just marking this for identification now? I object to its admission, Your Honor. The material shown in this newspaper is quite obviously not relevant to the purposes for which the Tuscarora Reservation was created or acquired, which is the only issue before this court. Secondly, the fact that something appears in a newspaper does not make it a matter of public record. What counsel is obviously trying to do here is to get in by the back door some purported legislative history on what Congress knew at the time of the 1957 statute. Now, what appears in the Niagara Falls Gazette, of course, is wholly irrelevant to any congressional—any legislative history. Legislative history is based upon what Congress knows and not what appears in newspapers, even Washington newspapers much less the Niagara Falls newspapers.

* * * * * * *

[fol. 4280] Presiding Examiner: We will get to the intent of Congress when evidence is introduced on that point, or evidence is attempted to be introduced on that point.

As far as the newspaper exhibit, which has been tendered for a number for identification, it has not been given to me yet.

I will mark it Exhibit 187 for identification, and I think it is permissible for the Power Authority to use it only for the purpose of refreshing this witness' recollection.

What the newspaper says, as I said before in regard to Exhibit No. 186, I do not think is relevant. What is published in the newspaper is not relevant unless properly supported in this court. So for the purpose of refreshing this witness' memory, it will be admitted—it will

be marked. It has not been offered before the Commission yet.

(The document referred to was marked for identification as Exhibit No. 187.)

Mr. Lazarus: May I say—counsel for the applicant has said the purpose for which he was seeking admission of this was to show what was common knowledge and the date the newspaper was published, and he also said in his remarks that it was admitted for the purpose of showing what was before Congress at the time of the 1957 Act. [fol. 4281] Those are the remarks of counsel.

Presiding Examiner: What the paper says about what was before Congress, you and I know, and the Judge knows, is not relevant.

* * * * * * *

[fol. 4282] Einar Greve was called as a witness and having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 4287] Cross examination.

By Mr. Lazarus:

Q. A prior witness from your firm, Mr. Ketchen, testified that your specifications were to put the transmission lines between the dike and the maximum extent of the take area, am I correct?

A. That is correct, with one exception.

Q. What is the one exception?

A. With one exception.

There is also—well, it will be between the dike and the take area, but there is also room for a highway along the east edge.

Q. But with respect to transmission lines, that was the specification?

A. That is correct, sir.

Q. Do we have here Exhibit 165?

A. Yes.

Q. Looking at Exhibit 165, you find a completely different construction of a reservoir than we have contem-

[fol. 4288] plated on Exhibit 161. Now if the Commission had licensed the reservoir as shown on 165 back in January of this year, would you have located the transmission lines around the edge of the reservoir as shown on 165 or would you have located the transmission lines as they are shown now on 161?

A. To make quite sure I understand your question, would I have located the transmission lines on this exhibit along the edge of the dike of this exhibit?

Q. Let me rephrase the question and ask you, if the reservoir that the Commission had approved in January of this year looked as it appears on Exhibit 165, where would you have located the transmission lines?

A. Generally speaking, I would have followed the south edge of the dike, the east edge of the dike and the north edge of the dike.

* * * * * * *

[fol. 4290] Recross examination.

By Mr. Hobbs:

* * * * * * *

[fol. 4291] Q. What is your estimated cost of relocation with respect to Exhibit 165?

A. I would like to have a clarification of that question. Are you asking me for the cost that would be involved in the work of relocation as if I started from scratch with nothing else having been done or if I started from what we have done so far and what has to be done?

Q. Do you have it both ways?

A. I would say if we were to build transmission lines on the basis that this would be the reservoir, not having considered the other, then the cost of transmission lines here would be approximately $300,000 more than the cost would be using a reservoir as shown in Exhibit 161, the [fol. 4292] reason being that you have a longer way to go. And also, that on Exhibit 161 I save some of the existing lines which are located inside here and which I do not have to move under the other scheme. I may show you that on Exhibit 161, perhaps.

This map is made up from a USGS map it is not very clear in details, but this dotted line following along the New York Central Railroad and turning north near Pletchers Corner which is here, is an existing line which we would not have to move if there is no reservoir going to be built on that area.

Presiding Examiner: What exhibit are you testifying from?

The Witness: I am testifying according to Exhibit 161, sir.

By Mr. Hobbs:

Q. What is your estimated cost of relocation of transmission lines on Exhibit 161?

A. You mean the total cost of relocation of the lines that are involved around the reservoir?

Q. Yes.

A. I do not have the exact figure here.

I have only concerned myself with the figure that interferes with the reservation land. However, I could supply you with the figure of relocation.

Q. Can you give it to me with respect to the reservation lands?

[fol. 4293] A. The two lines being built on the reservation land would cost us approximately $800,000, perhaps $900,000 for the construction and the materials, from $800,000 to $900,000.

We ran into some swamp here which ups the cost a little more than the original estimate.

Q. And that would be about $900,000?

A. I would say so.

Q. And do I understand that it would cost about $12,000 if you used the reservoir shown on Exhibit 165?

A. The additional cost of going around the Indian reservation here, that is if I were to go along the edge of the reservoir, rather than go in on the Indian land, would be approximately the same for this distance.

However, I get in addition to that the lines that would follow down along Saunders Road and the line that is inside here, that is inside the southern part of the reservoir shown in pink on Exhibit 165.

Now that cost would be in addition, since I would not have to do that if we went according to Exhibit 161.

I estimate the cost of the lines that will have to be brought down along the south side of the reservoir as shown on Exhibit 165 to be $1,200,000.

* * * * * * *

[fol. 4294] WILLIAM H. LATHAM was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. What is your occupation, Mr. Latham?

A. I am a civil engineer.

I work for the Power Authority of the State of New York, assigned as resident engineer on the Niagara Project.

Q. Are you the resident engineer in charge of the project?

A. At Niagara, yes.

Q. How long have you occupied that position?

A. I have been there for about two years.

Q. During that time, have you become familiar with the project area?

A. I have.

Q. Does that include the reservoir area?

A. Yes.

Q. Have you traveled over the reservoir area frequently?

A. Yes, I have.

Q. In what way, by car?

A. By car, and portions by foot and by air.

[fol. 4295] Q. How many times would you say you have flown over the area?

A. Oh, possibly 6 or 8.

Q. And have you driven over it very frequently?

A. Many times.

Q. You say you are familiar with the land in general and with the buildings on it?

A. Yes, I think I am.

* * * * * * *

[fol. 4299] Q. What, in general, would you say with respect to the condition of the houses on the reservation?

Mr. Lazarus: Objection, Your Honor.

We have no testimony that this witness is an expert on housing.

Mr. Rosenman: I am asking about the general appearance of the housing.

I do not purport to qualify him as an expert on housing.

Mr. Lazarus: What he is doing is comparing one type of housing with another type of housing.

That requires an expert judgment. I object to his testimony.

Presiding Examiner: Objection overruled.

The Witness: The houses on the reservation are in general smaller than the average houses in the area.

The construction is not as good grade as the houses in the general surrounding area.

Maintenance in general appears to be not as high a [fol. 4300] standard as in general.

Presiding Examiner: You are talking about the outside appearances?

The Witness: Yes, outside appearance, entirely.

By Mr. Rosenman:

Q. Have you been inside any of these houses?

A. I have been inside of one house.

Q. And have you been allowed in any others?

A. I have not been in any others.

I have not attempted to be in any others. Pardon, I was inside of Chief Greene's house, also.

Q. What other buildings are on the reservation?

Mr. Lazarus: Your Honor, I object to this entire questioning and move to strike the previous testimony on the ground that what the land looks like, what the crops on it are, is totally irrelevant to any issue before this Court.

The issue before this Court is strictly whether the reservoir will be consistent with or interfere with the purpose for which the reservation was created or acquired.

The use to which the land is being put or what it looks like has nothing to do with that issue.

Presiding Examiner: Objection overruled.

Mr. Lazarus: This is a continuing objection now, Your Honor.

Presiding Examiner: It will be so noted.

[fol. 4301] The Witness: In addition to houses, there are farm buildings, a few in reasonably good repair, some actually falling apart, a couple of churches, a couple of stores, gas stations, a school furnished by the State of New York, a gymnasium.

By Mr. Rosenman:

Q. Is that the building that you were in when the council was being held?

A. The gymnasium?

Q. The gymnasium, yes.

A. Yes.

Q. Can you describe that building?

A. It is a frame structure, almost completely open inside with a large basketball court, a narrow balcony that gives a space for spectators. The interior finish is not very refined and in general the building is rather worn.

Q. Rather what?

A. Rather worn. It shows evidence of rather heavy usage and not too much maintenance.

Q. Have you noticed any trailer camps in the area?

A. Yes, several.

Q. How many?

A. I haven't counted them. They appear to be developing more of them every week.

Q. And these trailers, do they generally house workers on the project, on the Niagara Power Project?

[fol. 4302] A. I understand they do.

Q. Was there a trailer court on the area before the Niagara Project started?

A. There was one.

Q. Do you have any estimate of the number of trailers that there are on the reservation now?

A. I do not, no.

Q. I show you a map entitled "Present Tuscarora Reservoir and Alternate Scheme No. 4."

May I have a number for this, Mr. Examiner?

Presiding Examiner: Judge, is this different from 165?

Mr. Rosenman: It is different in that this shows all of the details of the area, but it is the same as 165.

Presiding Examiner: The reason I asked that is because 165 was identified as being an Alternate Scheme No. 4.

Mr. Rosenman: This is similar to Exhibit 165 Alternate Scheme No. 4.

Presiding Examiner: It will be marked Exhibit 188 for identification.

(The document referred to was marked Exhibit 188 for identification.)

By Mr. Rosenman:

Q. Will you tell us how that map is made?

A. A composite of photographs taken vertically from the air and then brought to uniform scale and fitted to [fol. 4303] gether to make one continuous map. It is generally termed as a mosaic.

Q. And from your experience in flying over this area, is it a fair and accurate representation of the area and the roads and structures on it?

A. It is.

Q. As seen from the air?

A. It is a good representation of the conditions as seen at that time.

Q. Would you describe what these two patches in yellow are?

A. The yellow patch to the upper right, which is bounded on the lower and left sides by the red line, is the section of reservoir which would be within the limits of the Tuscarora reservation.

Q. And that patch is labeled "Indian Reservation," is that right, and "Present Reservoir"?

A. Yes.

Q. Now the yellow part is that part of the Indian reservation which under the present plan is to be taken?

A. That is correct. The lower yellow area is the equivalent area outside of the Indian reservation which would be required to give the same capacity of reservoir as the area in the Indian reservation.

Q. And is Exhibit 188 a counterpart of Exhibit 165 in [fol. 4304] showing the alternate site for the reservoir?

A. It is.

Q. The rest of the reservoir is indicated how on 188?

A. The rest of the reservoir is indicated as the bare photograph surrounded on the top and left and bottom by a green line and on the right by the red line, which indicates the boundary line of the Tuscarora reservation.

Q. Would you indicate to the Examiner and describe for the record—by the way, do you know when these pictures were taken?

A. In May of 1958.

Q. Since then, since May of '58, has there been any change of any kind that you have noticed on the part of the Indian reservation which is included in the project?

A. The only material changes is the work that has been done in connection with power project construction.

Q. What about the yellow patch on the alternate reservoir?

* * * * * * *

[fol. 4306] The Witness: In the alternate area a photograph at this time would show several new houses.

It would show—

By Mr. Rosenman:

Q. In which area, which locality?

A. In the alternate area colored in yellow.

Q. But near where?

A. Generally in the residential area. New houses are being built all the time.

Q. Go ahead.

A. Also there would be construction of the transmission line relocation which the previous witness testified to.

Q. Now will you show to the Examiner and describe for the record where the principal buildings are in the alternate reservoir?

A. Starting at the east side of the yellow area there is a small community known as Colonial Village with two streets north and south and some other shorter streets where there is a large number of houses.

[fol. 4307] Running off to the west from the south end of Colonial Village is another street lined with houses.

Then at the end of that street, running north and south, is Miller Road, which is pretty well lined with houses.

At the upper end of Miller Road, the large light spot in the Southwest corner of the intersection of that road and Saunders Settlement Road which is the winding road running across the whole area is a new school.

Mr. Lazarus: Your Honor, may I interrupt just for a minute to find out the state of the record?

Is it understood that I have a continuing objection? This is the second type of objection.

Presiding Examiner: Yes, that is right.

Mr. Lazarus: Continuing the one before with reference to land inside the reservoir. Now this is a continuing one with respect to the land outside the reservoir, on the ground that the alternative site is not material.

Presiding Examiner: It will be so noted.

Mr. Lazarus: I'm sorry for the interruption.

The Witness: The new school is approaching completion. Along Saunders Settlement Road to the west are numerous residences and farm establishments. At about the last bend in Saunders Settlement Road, three-quarters of the way across the alternate area a loop on the north side of Saunders Settlement Road shows the location of the Polish cemetery.

[fol. 4308] Flanking Saunders Settlement Road on the south is what is known as the Sweet Home residential area, and on the north is the Hewitt Drive residential area. Beyond Hewitt Drive, up in the upper left corner, is the Memorial Cemetery.

In the center of the lower westerly section of the area is another street with several houses on it. That covers the present structures in the area, and other developments.

Mr. Rosenman: I ask that Exhibit 188 be received in evidence.

Mr. Lazarus: I object to the admission of Exhibit 188 in evidence for reasons previously stated with regard to Exhibit 165 and already stated this afternoon, any material with reference to alternative sites or comparison of the

present reservoir site with some other alternative is wholly immaterial and irrelevant to the purposes for which this hearing was called.

I believe I have gone over those purposes sufficiently to advise the Court of the nature of the objection.

Presiding Examiner: Mr. Lazarus, some part of it might be admissible and some of it, as I have said before, I will hear you on in a motion to strike at the end of the testimony. But in the meantime, I will admit it subject to your objection and your motion to strike at the end of the testimony.

Mr. Lazarus: Yes, Your Honor.

By Mr. Rosenman:

[fol. 4309] Q. Mr. Latham, you pointed out Saunders Settlement Road. Will you state whether that is a main highway in the area?

A. Saunders Settlement Road is part of New York State Route No. 31, which is the only state route connecting Niagara Falls and Lockport, which is the county seat of Niagara County.

Q. Would that highway have to be relocated if the alternate reservoir were adopted?

A. I'll say this: The highway would be completely severed by the alternate reservoir location.

Q. Is it possible to relocate it?

A. It would be possible. I wouldn't call it "relocate it." It would simply have to be tied into some other highway convenient to it, but it would disrupt the orderly highway pattern of the area.

Mr. Rosenman: Mr. Examiner, I ask that you assign a number to another map entitled "General Map of Reservoir, Alternate Reservoir and Reservation Area."

Presiding Examiner: It will be marked Exhibit 189 for identification.

(The document referred to was marked Exhibit 189 for identification.)

By Mr. Rosenman:

Q. Will you describe what Exhibit 189 for identification is, Mr. Latham?

A. Exhibit 189 is a black line print showing the outline [fol. 4310] of the Tuscarora reservation, the outline of the reservoir as now planned, with the portion in the reservation cross-hatched in a direction from upper left to lower right, and outlined with a broken line, the alternate equivalent area required in the towns of Lewiston and Niagara if the reservoir is not constructed on the Tuscarora reservation.

That area is cross-hatched in a direction from upper right to lower left. It also shows the highways, rivers, the outlines of project construction and one or two other landmarks as they relate to the project.

It also shows the dividing lines between Lewiston and the town of Niagara and the portion of the Niagara Falls City line which comes within the limits of the map.

Q. Is this the Niagara River down at the lower portion of the map?

A. That is the Niagara River.

Q. And this vertical cross-hatching here is the proposed powerhouse, is it not, Lewiston powerhouse?

A. That is the Lewiston powerhouse.

Q. And up here at the bottom of a dark black line is the proposed Tuscarora pump power plant, is it not?

A. That is correct.

Q. I will indicate that by a TPP, Tuscarora power plant, is that right?

And the Lewiston power plant is indicated here, I will [fol. 4311] mark that as LPP.

Now the portion of this map entitled, which has the legend of "1695 Acres" is a part of the reservoir as presently constituted, is it not?

A. That is the portion outside of the Indian reservation.

Q. And the portion with the cross-hatching diagonally indicates 1380 acres, approximately, of the Tuscarora reservation, which is to be taken for the reservoir as presently constituted?

A. That is correct.

Q. And the rest of the area is the remaining part of the Tuscarora reservation, is that correct?

A. That is right.

That is enclosed in the dot-dash line.

Q. That indicates that if you took the Tuscarora 1380 acres, there would be 4869 acres remaining.

A. That is right.

Q. The cross-hatch running down from right to left is the alternate reservoir indicated on Exhibit 165 and on 188 in the event the Indian land is not used.

A. Yes, that is right.

Q. Have you indicated on here in tabular form the number of structures which would be flooded in the alternate area?

Mr. Lazarus: Objection; Your Honor.

(fol. 4312) By Mr. Rosenman:

Q. And the acreage?

Presiding Examiner: Objection overruled.

The Witness: The alternate area would be approximately 1721 acres. The preliminary surveys indicate 439 homes, one school, one church, two cemeteries and one combination store and home would have to be taken out of that area.

By Mr. Rosenman:

Q. On the Indian reservation, you have indicated the number of homes, and you have indicated one farm.

I suppose that would be modified by the testimony of Chief Patterson this morning as to the other farms on the area?

A. I think he is more familiar with the conditions there than we are.

Mr. Rosenman: With that modification by Chief Patterson, I offer this 189 in evidence.

Mr. Lazarus: Same objection, Your Honor.

Presiding Examiner: It will be admitted under the same conditions we have admitted the others.

(The document referred to, heretofore marked Exhibit 189 for identification, was received in evidence.)

Mr. Rosenman: Will you give another number, Mr. Examiner, to this map which doesn't appear to have any designation by title? It is an air oblique photo. I will have the witness describe it.

[fol. 4313] (The document referred to was marked Exhibit 190 for identification.)

By Mr. Rosenman:

Q. Will you describe what 190 is, Mr. Latham?

A. 190 is an enlargement of a single photograph taken from a point over Canada looking approximately due east toward the city of Lockport.

In the lower left at the bottom can be seen a section of the Niagara River gorge. The double circle just off left center at the bottom shows where Niagara University is located, and just below that to the left is the excavation for the Lewiston power plant.

Leading up and slightly to the right a broad white or a light colored strip is the partial excavation of the surge canal between the Lewiston plant and the Tuscarora pump generating station, and leading off to the right and angling slightly upward to the right edge of the picture can be seen the construction work in progress on the conduits for the power project.

Q. As you have just described, these conduits will carry water from the Niagara River above the falls down to the surge-canal and down to the Lewiston power plant, is that right?

A. That is correct.

Q. And at night time, and at other times, it is proposed to pump some of this water into the reservoir which ap[fol. 4314]pears immediately to the east, is that correct?

A. That is right.

Q. Go ahead.

A. The green line shows the outline of the reservoir as now planned.

The red line shows the portion which falls within the Indian reservation, and the yellow line shows the alternate

equivalent area outside of the reservation if the reservoir cannot be placed in the Indian reservation.

Q. When was this picture taken?

A. This picture was taken on November 20th.

Q. This year?

A. This year.

Q. That is last week?

A. That is correct.

Q. This is a blow-up of the original?

A. This is a blow-up of the original.

Within the reservoir area, between the lower green line and the red line, the light lines and broad patches show work already in progress on the power construction work.

Q. That is not Indian land?

A. That is outside of the Indian reservation.

The lines indicate small roads. The irregular areas in general are either storage or waste areas of material taken from the conduit and canal excavation.

[fol. 4315] The storage is necessary to hold material which will be used later on in construction of the dikes.

There is no construction evident in the Indian area except for the line of light spots which more or less parallels the left and top and right sides of the green outline of the reservoir.

That shows the excavation for the footings for the transmission lines which are being relocated around the reservoir as Mr. Greve described.

In the yellow area, in the alternate area, the houses can be seen as small blocks, many of them showing white light faces. The line running straight diagonally from the lower left to about center right is Military Road.

Just above Military Road and to the right of the green line is Memorial Cemetery. Below Military Road, between the green and yellow line, is work in connection with the project. The large rectangles are part of the plant for the manufacture of aggregate for concrete work.

Q. Does it show Saunders Settlement Road with the houses?

A. Saunders Settlement Road runs from about the jog in the yellow line winding upward toward the center of the

photograph and off toward the top center, the light line with the houses each side of it.

Q. Does the picture show Colonial Village?

[fol. 4316] A. Colonial Village is the group more or less in rectangular pattern just below and paralleling the upper yellow line.

Q. Exhibit 190 shows the same alternate reservoir as Exhibits 189 and 165, does it not?

A. That is right.

Q. The same area?

A. Yes.

* * * * * * *

[fol. 4319] William H. Latham resumed the stand and testified further as follows:

Direct examination (Resumed).

By Mr. Rosenman:

Q. Mr. Latham, before the Authority decided upon the present site of the reservoir, had it made studies of possible other sites?

[fol. 4320] A. There were quite extensive studies had been made of adjacent areas that offered some possibility.

Mr. Lazarus: Let the record show again that I have a continuing objection.

Presiding Examiner: It will be so noted.

By Mr. Rosenman:

Q. Will you describe what some of those sites were and why they were abandoned?

Which exhibit do you want?

A. Exhibit 165, I think would be the best one, 165 and 190.

Presiding Examiner: Mr. Latham, did you participate in the studies of this project before the disaster to Schoellkopf plant?

The Witness: No, I did not.

By Mr. Rosenman:

Q. What you are about to testify is after the disaster?

A. Yes, this was in the fall and winter of '56-'57. I collaborated with the resident engineers for Uhl, Hall & Rich on surface examination and related factors that might influence the location of a reservoir in the area to the northwest across Upper Mountain Road, Fish Creek and toward the escarpment and in the area to the south as far as Lockport Road and easterly out in the Colonial Village area.

[fol. 4321] The area up to the northwest across Upper Mountain Road, although it is open, crosses the bed of Fish Creek, and Fish Creek has a habit of disappearing in the ground.

As a matter of fact, during the last year it disappeared entirely before it reached its old outflow into the gorge, and it comes out an entirely different place after passing through the rock somewhere, and that indicated a rather questionable geological condition as a location for a reservoir.

Also going up in that direction, you get so close to the escarpment that again you are on very uncertain ground geologically.

The height of the dike crossing Fish Creek would have been substantially increased because the valley where the Creek runs through was about 20 feet below the general area of the ground. As to the area to the south and east, which is shown generally in red on Exhibit 165, although the topography was similar to that where the reservoir was finally located, the improvements of hundreds of homes and farms, houses cutting off the main highway routes indicated it would be most undesirable to go down in that area.

So we abandoned that location, too.

Q. Are you familiar with the number of graves that there are in these cemeteries?

A. At the time we made that investigation in the fall of '56, there were some 26 to 2700, as I recall it, in the Memorial Cemetery, and I understand that now that is up around 3,000.

[fol. 4322] Q. It is in one of the cemeteries?

A. That is in one cemetery, Memorial Park Cemetery on Military Road.

Q. Do you have any information about the other?

A. Not as to the number of graves, no.

Q. Did you examine, have you on various occasions looked at the houses on that part of the reservation which it is proposed now to take for the reservoir?

A. Only from the outside, driving by.

Q. Can you tell in a general way which of those houses could be moved by the Authority in the event that we were permitted to construct the reservoir on this site indicated?

A. Not as to individual houses. In general, possibly 60 to 75 per cent of them would be worth moving.

Q. Do you think the others could be moved?

A. The others could be moved, yes.

Q. There was some testimony here at the last hearing about various negotiations with the Tuscarora Nation about this land. Do you recall that?

A. Yes.

Q. Were you generally in charge at the site of negotiating with the Indians?

A. Yes, I was.

Mr. Lazarus: I have a continuing objection also to testimony about negotiations.

[fol. 4323] Presiding Examiner: It will be so noted.

By Mr. Rosenman:

Q. Do you recall about when you first approached the nation with respect to the reservoir site?

A. As to the reservoir site, the first approach to the nation was made in March of 1957.

Q. But before that, had you had any negotiations with anyone or had you had any conversations with anyone of the nation?

A. I had made contact with Clinton Rickard in December of 1956. I had met with him on December 17, 1956.

Q. And why did you consult with him?

A. I consulted with him because in the development of plans for the powerhouse in the gorge, it became apparent that it would be necessary to haul material down the gorge, and I learned that the Tuscaroras had fishing rights along the shore of the gorge, and I wanted to talk to the Indians

to tell them that we intended to maintain the conditions suitable for fishing; although we might possibly interfere with them during the construction period, we would restore the conditions.

Q. And did you, sometime in January of 1957, talk with Mr. Rickard about the necessity for surveys?

A. Yes, I saw Mr. Rickard again on January 22nd, 1957, in company with Harry Smith, and discussed with him the need for making engineering surveys of portions of the Indian reservation.

[fol. 43[illegible]] Q. Are you familiar with the 26th Annual Report of the Power Authority of the State of New York dated January 28th, 1957?

A. I am.

Mr. Rosenman: May I have this given a number for identification?

Presiding Examiner: It will be marked Exhibit 191 for identification.

(The document referred to was marked Exhibit 191 for identification.)

By Mr. Rosenman:

Q. Did you send any copies of this report to Mr. Rickard?

A. I sent six copies to Mr. Rickard on January 29th, 1957.

Q. Is this the letter of enclosure?

A. This is a copy of the letter by which I transmitted those copies of the report.

Mr. Rosenman: May I have this given a number, please?

Presiding Examiner: That will be marked Exhibit 192 for identification.

(The document referred to was marked Exhibit 192 for identification.)

By Mr. Rosenman:

Q. Does this Exhibit 192 refresh your recollection about [fol. 4325] having talked with Mr. Rickard about the necessity of surveys and the land in this area?

A. Yes, that confirmed our meeting with him.

Q. When is the next time that you had any contact with the Tuscarora Nation with respect to the land in this area?

A. During early March—

Q. Which year was this?

A. —of 1957, on advice of Mr. Rickard, I called Hamilton Mount Pleasant and asked him to arrange for a general council meeting of the Tuscaroras.

Q. And did you confirm that by letter?

A. And the date of the meeting was set at March 6th, and I confirmed that by letter and sent Mr. Mount Pleasant, with the letter, a copy of the 1956 aanual report.

Q. That is Exhibit 191?

A. Exhibit 191.

Q. Is this the letter which you sent to Mr. Mount Pleasant?

A. This is a copy of the letter, yes.

Q. Dated February 20th.

A. February 20th, 1957?

Mr. Rosenman: May I ask that this be given a number, please?

Presiding Examiner: It will be marked Exhibit 193 for identification.

(The document referred to was marked Exhibit 193 for identification.)

[fol. 4326] By Mr. Rosenman:

Q. After Exhibit 193 was sent, you say the date of March 6th was agreed upon for the council meeting?

A. Yes.

Q. And who attended that on your behalf?

A. Harry Smith and Mr. E. J. Nehman, who was attending as a spectator. He is the resident for Uhl, Hall & Rich, our engineers.

Q. Without going into details of what happened at the general council meeting, did you request permission to conduct surveys on the reservation?

A. I did. I explained the necessity for the surveys and requested permission to make the surveys and the request was denied.

Q. After that, during the summer of 1957, were there other contacts made with Chief Greene and Chief Patterson about surveys and the extent of the reservoir on the Indian reservation?

A. Yes, the Authority retained the services of Harry Smith to work with the Tuscaroras to see if we could negotiate permission to make surveys for the reservoir.

Q. And what was the general result of those negotiations?

A. Nothing productive whatsoever.

Q. On September 17th, did Chairman Moses send a formal request?

[fol. 4327] A. He did.

Q. Do you have a copy of that there?

A. I think I have.

Q. I have it. Is this the telegram that Chairman Moses sent?

A. Yes, that is.

Mr. Rosenman: We appear not to have copies.

It is very short and I would like to read it into the record. This is addressed to Head Chief Elton Greene and reads as follows:

"Dr. Bates of Cornell has talked with Trustee John Burton about relations of your nation with our State Power Authority. I have asked John Burton to meet with you and your associates to explain the plans and needs of our State Power Authority if you would wish such a meeting. Our Authority is anxious to be a good and friendly neighbor of your nation and I wish to assure you that time will prove us to be just that.

"Right now we are sorely pressed by the need to do surveying in the northwest corner of your reservation in relation to planning the location of a storage reservoir. Would you be able to give us promptly a right of entry simply to do surveying work without binding your nation or people in any way to possible future acquisitions or prices? Signed, Robert Moses, Chairman of the Power [fol. 4328] Authority of the State of New York."

This is dated September 17th, 1957.

By Mr. Rosenman:

Q. Was that right of entry refused?

A. It was.

Q. I show you Exhibit 181 for identification. This is the open letter to the Tuscarora Indian Nation.

You are familiar with that?

A. Yes.

Q. Will you tell us what you did with respect to that letter, that brochure?

A. I had 12 copies of that delivered by hand to Chief Greene on February 11th, 1958.

Q. What else did you do with respect to it?

A. And during the following day or two, 184 copies were delivered by box delivery through the Post Office to all the delivery boxes on the reservation.

Q. And did you supervise that?

A. I did.

Mr. Rosenman: In view of the testimony, Mr. Examiner, I ask that Exhibit 181 for identification be received in evidence.

Mr. Lazarus: Objection, Your Honor. It has nothing to do with any of the issues before this Commission. Negotiations do not relate either to the purpose for which the [fol. 4329] Tuscarora reservation was established or whether proposed license will be inconsistent with that reservation.

These are the only issues before the Commission.

This exhibit, and of course, all of the other exhibits relating thereto including the telegram which was read into the record, are all irrelevant and should not be admitted.

Mr. Hobbs: Mr. Examiner, as I have pointed out Friday, I believe it was in the Idaho Power Company case which involved a review of an order of the Federal Power Commission, 344 US, page 17 cited by this Court, the Court of Appeals for the District of Columbia and the opinion was written by the same judge who wrote the opinion here, in view of that decision, I do not think we can assume that this Court is attempting to tie the Commission's hands on rehearing, on further hearing.

In 344 U.S. 17 the Supreme Court of the United States, reversing the Court of Appeals held that the whole matter is before the Commission on remand and so I think that is the situation here and I do not see how there could be very much room for argument on it.

Presiding Examiner: The Circuit Court of Appeals for the District of Columbia, in remanding this case to the Federal Power Commission, said the Federal Power Commission should explore the possibility of making this finding.

Now this is, to my mind, a part of the exploration of those possibilities. It will be admitted subject to your [fol. 4330] reservation of an objection.

(The document referred to, heretofore marked Exhibit 181, was received in evidence.)

* * * * * * *

[fol. 4331] By Mr. Rosenman:

Q. Do you recall another general council meeting of the nation in May of 1958?

A. Yes, I do.

Q. And do you recall representatives of the Authority being present?

A. Yes.

Q. Governor Poletti was there?

A. Governor Poletti.

Q. He is a member of the Authority. Was Mr. Hills there?

A. Mr. Hills was there.

Q. Was I there?

A. You were there.

Q. And Mr. Moore, the General Counsel?

A. Yes.

Q. You were there, were you not?

A. Yes, I was.

[fol. 4332] Q. At that time, did we repeat, or was there repeated on behalf of the Authority the offer which was being made to the Indians for this land?

A. Yes, it was.

Q. Would you state generally what that offer was?

A. At that time the offer was $1100 an acre for the land.

They were offered cheap power from the Niagara Project. We offered to move their houses. We offered to replace the houses that were not moved with houses which were being held in an area already acquired outside the reservation, and incidentally, they are still being held for that purpose. We offered to see that their men would be employed on the project, and they have been employed on the project.

Q. This dollar amount that you mentioned was for the land alone, was it not?

A. That was just for the acreage alone.

Q. And for the houses that could not be moved or replaced, did the Authority offer to pay for the houses?

A. Yes, it did.

Q. What about the community center to replace the gymnasium, the condition of which you testified to at the last hearing?

A. The Authority offered to provide a new gymnasium, a community center, a community hall with modern up-to-date facilities and equipment including outdoor facilities [fol. 4333] that would be integrated with it.

Q. And what was the estimate of what that would cost?

A. In the neighborhood of $100,000.

Q. I show you Exhibit 182 for identification.

Does this have a projected drawing on pages—what pages are those of the community center you are talking about?

A. It would be page 1, the inside of the cover on page 1.

Q. That offer was not accepted at the meeting, was it?

A. It was not.

Q. After that, the following day, or the day after that, did Chairman Moses send the telegram to Chief Greene which Mr. Lazarus read into the record?

A. The day after.

Q. That was May 6th.

A. May 6th.

Q. That was the day following that meeting, was it not?

A. That is right.

Q. I show you 182 for identification again, and ask you whether you know about that brochure.

A. Yes, I am familiar with it.

Q. Was that brochure distributed by you to the Indians?

A. No, it was not.

Q. And would you state what happened?

[fol. 4334] A. The brochure was released in New York and it came out in the local papers before the brochure itself reached the Niagara office.

Q. Which papers carried it? Do you have copies of the papers here?

A. I have copies of the papers here.

Q. Which papers were they, and the dates?

A. The Niagara Falls Gazette on June 9th quoted the brochure, the Buffalo Courier Express for June 10th, that is the morning paper, referred to the brochure and quoted Chief Greene as being opposed to the statements made in the brochure.

Mr. Lazarus: This is fairly incompetent.

Presiding Examiner: The objection will be so noted.

The Witness: Niagara Falls Gazette for June 10th quoted Chief Greene, Buffalo Evening News for June 10th quoted Chief Greene and the Niagara Falls Gazette for June 11th further quoted Chief Greene with respect to the brochure.

By Mr. Rosenman:

Q. And for that reason you did not mail them out to the members of the tribe the way you did the other brochure?

A. The brochure did not reach our office until some days later and it seemed rather academic to send them out at that time.

Q. What do you have here in the way of copies of these newspapers?

[fol. 4335] A. I have original copies of all papers referred to, one copy of each.

Mr. Rosenman: I would like to ask that these be marked as separate exhibits, Mr. Examiner.

First is the issue of the—

The Witness: Niagara Falls Gazette for June 9th.

Mr. Rosenman: —Niagara Falls Gazette of June 9th. Of course, all that we are interested in here is the story about this brochure, not the rest of the newspaper.

Presiding Examiner: Niagara Falls Gazette dated Monday, June 9th, 1958, will be marked Exhibit 194 for identification.

(The document referred to was marked Exhibit 194 for identification.)

Mr. Rosenman: Then is the Buffalo Courier Express of Tuesday morning, June 10th.

Presiding Examiner: That will be marked Exhibit 195.

(The document referred to was marked Exhibit 195 for identification.)

Mr. Rosenman: For the record, Exhibit 194 has this story on the front page, and the Courier Express, which you have marked Exhibit 195 has the story on page 6.

Then the Buffalo Evening News of Tuesday, June 10th, which has the story on page 4.

Presiding Examiner: It will be marked Exhibit 196 for identification.

[fol. 4336] (The document referred to was marked Exhibit 196 for identification.)

Mr. Rosenman: Then the Niagara Falls Gazette of Wednesday, June 11th, which has the story on page 30.

Presiding Examiner: Niagara Falls Gazette for Wednesday, June 11, 1958, will be marked Exhibit 197 for identification.

(The document referred to was marked Exhibit 197 for identification.)

OFFERS IN EVIDENCE

Mr. Rosenman: I now offer, Mr. Examiner, Exhibit 182 for identification and Exhibit 194, 195, 196 and 197 in evidence.

Mr. Lazarus: Same objection to 182, Your Honor, and with respect to the newspapers, they are certainly not competent evidence of anything.

Mr. Hobbs: Mr. Examiner, it seems to me the newspapers are evidence of general knowledge that these brochures

were in circulation at that time, and such general knowledge I think a court could take official notice of.

Mr. Lazarus: If I recall correctly, the dates on these June newspapers were June 11, June 10, June 9. If I remember correctly, a motion for a rehearing of this particular case was denied by the Commission in March.

Now, what relevance newspapers in June can have upon an issue that was decided by the Commission previously in March is quite beyond comprehension.

The fact that the brochures were circulated is quite [fol. 4337] irrelevant in terms of the purposes of this hearing, which are what is the purpose of the Tuscarora reservation and what effect will the reservoir have upon it.

Now, what is said in newspapers about what is said in brochures, which brochures by the witness' own admission never were delivered to the Tuscarora Nation, has absolutely no relevance to what goes on in this hearing, and is of course incompetent evidence.

Mr. Rosenman: We are here considering the negotiations between the Authority and the Tuscarora Nation and this is a part of that series of negotiations.

Mr. Hobbs: Mr. Examiner, I think Mr. Lazarus put his finger on it when he said the rehearing was denied by the Commission. That is true. So he went to the Court of Appeals after review of the Commission's order, and now we are back. The Commission has granted not only a rehearing with respect to the matters that Mr. Lazarus is concerned with, but now the whole proceeding on licensing is before the Commission.

Presiding Examiner: Exhibit 182, 194, 195, 196 and 197 will be admitted in evidence and I will hear you, Mr. Lazarus, at the end of the testimony on motions to strike.

(The documents referred to, previously marked Exhibits 182, 194, 195, 196 and 197 for identification were received in evidence.)

Mr. Rosenman: Will you straighten me out?

[fol. 4338] Has Exhibit 191 been received in evidence?

Presiding Examiner: 191 has not been.

Mr. Rosenman: I offer it in evidence.

Presiding Examiner: 191, 192, and 193 have not been.

Mr. Rosenman: I offer those three in evidence.

Mr. Lazarus: Same objection.

Presiding Examiner: They will be received subject to the same conditions.

(The documents referred to, previously marked Exhibits 191, 192, and 193 for identification, were received in evidence.)

Mr. Rosenman: I now offer in evidence a letter from Mr. Moses to Mr. Lazarus dated May 9th, 1958.

Presiding Examiner: That will be marked Exhibit 198 for identification.

(The document referred to was marked Exhibit 198 for identification.)

Mr. Rosenman: That is all I have of this witness, Mr. Examiner.

Presiding Examiner: Judge, did you offer 198?

Mr. Rosenman: Yes, I offered that in evidence.

Mr. Lazarus: Same objection.

Presiding Examiner: It will be received in evidence subject to you being heard on it, Mr. Lazarus.

(The document referred to, heretofore marked Exhibit 198 for identification, was received in evidence.)

[fol. 4339] Presiding Examiner: Does staff have cross-examination?

Cross examination.

By Mr. Hobbs:

Q. Mr. Latham, I call your attention to Exhibit 198, where you have:

"We are also willing to build for them a fine community center and athletic field, the cost of which we have estimated at about $250,000."

Is that one building?

A. Only one building was planned.

Of course, the athletic fields and related improvements would be in addition to the building.

Q. Does the $250,000 cover both the athletic field and the community center building?

A. That was the intent, yes.

Q. Was that community center building to include a gymnasium?

A. It would have a gymnasium and other rooms and facilities for various community activities.

Q. What size buildings did you have in mind there?

A. I do not recall the dimensions.

Q. Will you look at Exhibit 182, I believe it is.

A. No dimensions in that, no.

Q. No dimensions in that?

A. No.

[fol. 4340] Q. Do you know the dimensions of the present building, approximately?

A. I only could estimate: About 35 by somewhere around 60 feet long, I would say.

Q. 35 feet wide and 60 feet long?

A. Somewhere around 35 feet wide by 60 feet long, in that area.

Q. What is the condition of that building generally?

A. It is quite worn and pretty well ran down.

Q. What type of structure is that?

A. Frame.

Q. Is that a one-story building?

A. Well, there is only one story in use. It has a high headroom. It is a good basketball court inside as to dimensions, and a narrow balcony around the basketball court, so its actual height would be the equivalent to about a $2\frac{1}{2}$- or 3-story house, but there is only one floor, actually one full floor in use.

* * * * * * *

[fol. 4341] Q. Are you familiar with the determination by the Commission in its original order of January 30, I believe that is 1958, requiring the Authority to cover the intakes, I mean the conduits from the intake to the Tuscarora plant?

A. I have read it.

Q. Do you recall that the Commission there based its decision requiring covered conduits partly on the egress

from the area adjacent to the river to the area beyond the conduits?

A. I do not quite follow you on that question.

I don't get the sense of it.

Q. The Commission required these conduits to be covered.

A. That is right.

Q. And what is your understanding of the reason for it?

A. You want me to interpret the Commission's reason?

Q. Yes, as you understand it.

A. In the first place—

Mr. Lazarus: Objection, Your Honor. This witness is not competent to testify on what was in the Commission's mind.

Mr. Hobbs: Mr. Examiner, as was mentioned in that decision, it required the conduits to be covered in order to avoid disruption. A part of the reason was to avoid disruption between areas on either side of the conduit, and what I intended to ask the witness was whether that would [fol. 4342] also be true in his opinion if the reservoir were constructed as shown on Exhibit 165.

Presiding Examiner: Objection is overruled.

Mr. Lazarus: Can we have the question repeated now, please?

Presiding Examiner: He asked why the conduits were ordered filled.

The Witness: Do I understand that what you want me to do is compare the effect on the community as to a disruption between what had originally been planned as open conduit from Lockport Road to the intake and if the license required it to be covered as compared with the alternate reservoir scheme?

By Mr. Hobbs:

Q. That is correct, as shown on Exhibit 165.

A. In the testimony in the original hearing the Power Authority showed that the proposed open section of the conduit from the city line north would be crossed by a bridge to carry Whitmer Road, that is State Route 31, across the conduit. The Authority also stipulated that it

would build additional bridges across the open conduits as they might become necessary for proper development of the community.

If the reservoir were constructed in the alternate area as shown on Exhibit 189, the effect would be substantially the same in extent as the open conduits would have had, but with this difference: That it would not be even possible [fol. 4343] to bridge across the reservoir, so that whereas the open conduits were looked upon by the local people as being a barrier to future expansion of the local community, which could have been accommodated very easily with bridges and other means of getting across the conduits, the reservoir would be a complete and absolute permanent barrier to the same amount of expansion.

Q. And the alternate reservoir that you refer to on Exhibit 189 is the same one that appears on Exhibit 165?

A. That is right.

Q. I show you Exhibit 188. I ask you with respect to the proposed reservoir covering approximately 1380 acres of Indian land, I call your attention to roads shown thereon.

What would be the effect on those roads?

A. You mean the roads within the Indian reservation?

Q. Yes.

A. Moyer Road would be completely eliminated in that area and Garlow Road would be completely eliminated across the reservoir.

But the plans as submitted to the Federal Power Commission, and as approved in the license, called for a new road to be built along the east side of the reservoir to serve the traffic which ordinarily or now would be going along Garlow Road.

Q. And what would happen, what are the plans with respect to the other road shown there?

A. Moyer Road would be completely eliminated. It is [fol. 4344] taken out all the way from Upper Mountain Road right through to Garlow Road. There just isn't any road left there.

Q. And what does that road go to?

A. Running east it runs into Mount Hope Road on the Indian reservation.

Q. And how would you get there if this reservoir were constructed as proposed by the Authority?

A. You would have to run along the new road along the east side of the reservoir to tie into Mount Hope Road about midway of the east side of the reservoir.

Q. And how does the new road proposed compare with the existing road in width?

A. It was planned to be a two-lane road, the same as Garlow Road. It would be built to better standards than Garlow Road is now built.

Q. What do you mean by that?

A. It would be a higher class road, a heavier road, which would stand traffic and stand up better. It would be a smoother road.

Q. Are you familiar with the traffic on that existing road? Have you observed it?

A. I have been on it a number of times. It carries very light traffic.

Q. I am not sure, but I understood you to say about 65 [fol. 434] per cent of existing houses could be moved.

Were those the existing houses that were within the Indian reservation to be relocated if the reservoir is constructed as proposed?

A. I was referring to the houses within the area covered by the reservoir in the Indian reservation, only those in the reservoir area.

Q. And why do you think approximately 65 per cent only could be relocated, could be removed?

A. The others are not in very good condition. Some of them are not very well built, and they do not appear to be in such condition that it would be economically worthwhile to move them.

Q. What type of houses are they?

A. They are all frame houses.

Q. You mean they are in poor condition?

A. That is right.

Q. Who is Mr. Clinton Rickard?

A. He is a member of the Tuscarrora Nation, as far as I know.

Q. Do you know whether he is one of the Chiefs of the Tuscarora Nation or not?

A. He calls himself a Chief, but I understand he is not officially a member of the Chiefs Council.

Q. Why did you contact Mr. Clinton Rickard?

[fol. 4346] A. He was represented to me by a person who I thought should know that he was a responsible member of the tribe.

I was new in the area and I was taking the word of a man in a position who should have known.

Q. Who was that?

A. The former Mayor of Niagara Falls, Ernest J. Mirrington.

Q. Does Mr. Clinton Rickard live on the reservation?

A. Yes, he does.

Q. Is his house located within the reservoir area, do you know?

A. No.

Q. Can you tell us about the houses in the so-called alternate reservoir area shown on Exhibit 165 as to whether those could be moved, and if so, how many?

The photographs I believe are shown in Exhibit 180.

A. Most of the houses in that area are comparatively new and so built that they could be moved.

Some older houses generally along Saunders Settlement Road, some of them might be worth moving, some might not. I have made no detailed study of that situation.

Q. Have you made enough study to form any opinion as to about how long it would take to relocate those houses, to move them?

A. We haven't studied that situation yet.

[fol. 4347] Q. I believe those houses are shown in the pictures in Exhibit 179.

How do those houses compare with the houses in the reservation, in the reservoir area?

Mr. Lazarus: This testimony, Your Honor, is of course objected to as a result of the continuing objection I made on Wednesday.

Presiding Examiner: It will be so noted, Mr. Lazarus.

The Witness: In general they are much better built. In general they are much newer houses.

By Mr. Hobbs:

Q. Have you made any studies to determine where those houses could be moved to in the event they are moved, the ones shown in Exhibit 179?

A. No, we have not.

Q. Have you made any study to determine where the houses could be moved to, those that could be moved, that are located within the Indian reservation in the reservoir area?

A. We have made no study of where they could be moved to. We have been unable to discuss the matter with the Indians to see where they would like them moved. They wouldn't talk about it with us.

We tried, but they wouldn't talk to us about it.

Q. Has any provision been made for providing houses for those people that would be moved out of the reservation, [fol. 4348] in the reservoir area, I mean.

A. In the Indian reservation?

Q. Yes.

A. Yes, I said before we are prepared to move the houses that are worth moving and to provide replacement houses that we have available for those that are not worth moving. We are prepared to move them to any suitable location on the reservation.

Q. And what type of houses do you have that you intend to provide in lieu of the houses you intend to move?

A. Most of them are comparatively new ranch type homes.

Q. And how do they compare with the ones which you cannot move?

A. They are considerably better.

[fol. 4361] By Mr. Lazarus:

Q. Mr. Latham, on Exhibit 189, within the proposed reservoir and within the Tuscarora Reservation, there is the figure 1380 acres. Is that an accurate figure?

A. Well, some places it appears 1383. On this map it is rounded out to 1380.

Q. Are the other figures on this map rounded out?

A. No, I do not see any that I would consider as such.

Q. Well why did you round out figures for Indian lands and not round out figures for non-Indian lands?

A. I did not prepare the map, I do not know why it came out 1380 on that particular map.

Q. Were you in any way concerned with the preparation of this map?

A. Yes.

Q. Did you give the instructions to round out Indian figures and to keep accurate non-Indian figures?

A. No, I did not.

Q. Do you know who gave those instructions?

A. No, I do not.

Q. Do you know why those instructions were given?

A. No, I do not.

Q. On the righthand side of the map about the center [fol. 4362] there is an area which theoretically represents an alternative taking area. The exact figure is 1721 acres which appears in there?

A. Yes.

. . . . . .

[fol. 4368] Q. On the basis of a comparison, since comparative costs seem to be part of this record, and comparative availability don't you think the impact upon the town of Niagara, percentagewise, in the land taking might be material?

A. The impact of the taking for the alternate reservoir would be material.

Q. I see. And we have talked with respect to Exhibit 189 about the alternative reservoir. Why did you not make the calculation?

A. I did not think it necessary.

Q. We have the figure 439 homes with respect to the alternate land. Do you know how many of these houses are in the town of Niagara and how many are in the town of Lewiston?

A. I have no figure on that.

Q. Do you know how many homes are remaining in the town of Lewiston?

A. No, I do not.

. . . . . .

[fol. 4379] Q. Reference has been made during the course of your testimony to Clinton Rickard and how in your first negotiation, or your first visits to the Tuscarora Reservation, you visited Clinton Rickard. Are you aware of the fact that Clinton Rickard does not occupy a position of authority on the Tuscarora Reservation?

A. I was not at the time. I have since been corrected.

Q. Is it not true that you could have stopped anyone on the Tuscarora Reservation who is a member of the Nation and be dealing with someone with at least as much authority as Mr. Rickard?

A. I would not know as to that.

. . . . . .

[fol. 4381] Q. Do you know what the effect of the proposed reservoir here will be on the land beneath it?

Let me get directly to the point: If this reservoir were constructed in part on the Tuscarora Reservation, could Tuscarora Indians get any beneficial use out of that portion of their lands which were then under water?

A. Not while it is being used as a reservoir.

Q. Could the Tuscarora Indians, if this proposed plan or the plan contemplated by the power authority were put in effect, could the Tuscarora Indians get any beneficial use out of the 1,383 acres shown on Exhibit 189?

[fol. 4382] A. Oh, they could get beneficial use out of it if they would take what benefits have been offered them in place of their land.

Q. Out of the land itself, not out of what you may think is an adequate substitute?

A. You mean direct use of the land?

Q. Yes, direct use.

A. I do not know—they would not be able to do anything on the land that would give them any return.

Q. Could they live on the land?

A. No.

Q. Could they occupy the land?

A. No.

Q. In any way?

A. No.

Q. Farm the land?

A. No.

Q. Grow trees on the land?
A. No.
Q. Grow crops on the land?
A. No.
Q. Grow weeds on the land?
A. No.
Q. No use whatsoever?
A. No Productive use that I know of.

[fol. 4384] By Mr. Chace:

[fol. 4386] Q. And did your testimony with respect to the number of acres in the town of Lewiston which could be taken—I believe it was 3,050—include transmission lines?

A. I believe it would. I think that is the total acreage for all project work. I can have that checked also.

Q. Now the right-hand side of 189, as it stands there, is the south, and there is a narrow strip shown on that south line between the New York Central right-of-way, Lockport Road, and the reservoir area.

A. Yes.

Q. Are transmission lines to use that additional strip in there?

A. No, the transmission lines will be within the heavy broken line.

Q. At that point?

A. Yes.

Q. Are you familiar with the railroad relocation project in Niagara Falls?

A. In general.

Q. Do you know whether the Erie classification yards are to be moved according to the plan to that general locality?

[fol. 4387] A. Yes. The yard work would get out into that area.

Q. Would this taking then interfere with that classification area?

A. That is something that I have not seen the detail relationship as yet. It might call for some modification.

Q. You know that the Erie classification yards are scheduled to be located in that general area?

A. That is right.

Q. And do you know that Niagara Mohawk Power Corporation is presently in the process of acquiring a 500-foot strip generally paralleling Lockport Road on the north for transmission line purposes?

A. I am not familiar with the details on that.

Q. You know that there is a proposal for Niagara Mohawk to construct a transmission line?

A. I have heard it mentioned, yes.

Q. Would you know whether it would generally parallel Lockport Road at a point roughly 500 feet north of Lockport Road?

A. I understand it is in that general area, but I have seen no plan showing its location.

Q. What would that transmission line be used for, Mr. Latham, if you know?

A. All I have heard is that that line runs from this area out to the area of Rochester.

[fol. 4388] Q. Is it to be interconnected with the Power Authority project?

A. I am not familiar with our interconnections with Niagara Mohawk as to that particular matter.

Q. Would this proposed alternate site interfere with such a transmission line or cause it to be moved to some other location?

A. It would call for further study.

Q. You could not have a transmission line across the reservoir, could you?

A. Not very well.

[fol. 4389] Q. Do you know whether there is any site available for cemetery use in the event of a removal of Memorial Park?

A. I do not know of any site. There has been no site study.

Q. I do not suppose you have any familiarity with the cost of moving a cemetery?

A. Well, the estimates on that, in that area, as I understand it, is about $400 a grave, for just the removal of

graves. Of course, Memorial Park has other developments, improvements, that would be added above the grave cost.

Q. And there are about 3,000 did you testify to that?

A. The latest information I have.

Q. That does not include the acquisition of another site?

A. No.

Q. And it does not include the damage which would result to the cemetery by taking of additional lots which were available and not used?

A. No.

[fol. 4399] MAX HASTLEY was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

[fol. 4405] Q. By the way, you do farm certain parcels on the reservation, do you not?

A. Yes.

Q. And do you have them from the members of the tribe by a written lease or an oral lease?

A. Mostly oral.

Q. Do you have any written leases at all?

A. One, but that is only between the owner and me. It is not registered.

Q. It is not registered?

A. No.

Q. First coming to the oral leases, do the various yellow patches on here, which have a No. 7 indicate parcels on the Indian reservation which you work as a farm?

A. Yes.

Q. You have located those before so that you know that this is accurate, is that correct?

A. Yes.

Q. How many acres altogether of Indian land do you farm?

A. At that time I told him 240 roughly.

[fol. 4406] Q. And is that about your estimate now?

A. I don't know.

When he figured it up he says 244.

Q. Well, it is either 240 or 244, is it not?

A. Yes.

Q. Does that include both the oral and the written lease?

A. Yes.

Q. Can you give us the names of the members of the tribe from whom you rent this land?

A. I could.

Q. Would you give them to us, please?

A. Well, there is Mr. Greene for one.

Q. Is that Chief Greene?

A. That is right.

Q. Elton Greene.

A. And Truman Johnson, Mrs. Doris Printup, Grace Miller and the nation and a Mrs. Dubeck and a Chester Rickard.

I think that is all.

Q. Which parcel do you rent from the nation itself as distinguished from these other members that you mentioned?

A. This field right here, these 31_2 of this.

Q. Those are parcels that are contiguous to Upper Mountain Road or near Upper Mountain Road. Is this Upper Mountain Road?

A. That is right.

Q. That is the westerly part of the reservation, isn't it?

[fol. 4407] A. East side of Garlow Road.

Q. East side of Garlow Road. Those belong to the nation, itself?

A. As I understand it.

Q. That is where you rent them from?

A. Yes.

Q. Can I put a "T" meaning Tuscarora Nation next to these parcels? Am I doing it correctly?

These are the ones you pointed out, is that correct?

A. No, half of this field here and these three, and this section over in here.

Q. Now this yellow patch, half of this field is missing, is it not?

A. That is right.

Q. About this much?

A. That is right.

Q. Indicating in a north and south pencil mark. I will put the "T" there. That is from the Tuscarora Nation, is that correct?

A. That is correct.

Q. Can you tell us how long you have been farming on Indian land by leasing it, how many years?

A. Me, myself?

Q. Well, first you, yes.

A. Well, about 1945.

[fol. 4408] Q. And did your father—

A. I didn't have all of that, though, when I first started out.

Q. Did some member of your family lease the same land or part of the same land before 1945?

A. I would not know. They might have.

Q. You are talking only about what you, yourself, have done. That is 13 years.

A. I know they rented land from them, but I do not know which ones.

Q. And by "they" you mean your father?

A. My father and both my grandfathers.

Q. They rented land from the Indians on this reservation for farming purposes?

A. That is right.

. . . . . .

[fol. 4413] Cross examination.

By Mr. Lazarus:

. . . . . .

[fol. 4417] Q. Mr. Haseley, I ask you to look at Exhibit 168. Do you see this area here which is marked in blue which is the area that is going to be taken for the proposed reservoir?

A. Yes.

Q. Do you farm in there?

A. No.

. . . . . .

[fol. 4420] HUBERT HASELEY was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

* * * * * * *

[fol. 4421] Q. Do you farm land on the Indian reservation?

A. I do.

Q. How long have you been farming land on the reservation?

A. As long as I can remember.

Q. Would you say it was 40 years?

A. I think so, yes.

* * * * * * *

[fol. 4422] Q. Do you rent it at a certain amount per acre?

A. Yes.

Q. Can you tell us how much you pay an acre?

A. $2.00.

Q. I beg your pardon?

A. $2.00.

* * * * * * *

[fol. 4424] Q. But the total you know is about 50 acres?

A. Fifty or a little better.

Q. Have you noticed in the neighborhood of your land any abandoned farmland; land that used to be farmed and is not farmed anymore?

A. No, I know of a few pieces laying idle, if that is what you mean.

Q. Yes. And are they on the reservation?

A. That is right.

* * * * * * *

[fol. 4426] Cross examination.

By Mr. Lazarus:

Q. Mr. Haseley, looking at Exhibit No. 168, do you see this area marked in blue on the map?

A. You mean these here dark colors?

Q. The blue ones.

A. Yes.

Q. Do you know that that indicates the area within the Tuscarora reservation which it is proposed to flood for the reservoir?

[fol. 4427] A. I didn't know but that is about the location.

Q. Do you farm in that area.

A. No.

* * * * * * *

[fol. 4432] CARMEN NICHOLS was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

* * * * * * *

[fol. 4434] Q. How long have you been farming land on this reservation, Mr. Nichols?

A. Myself?

Q. Yes.

A. Since 1949.

Q. And did any member of your family farm there before?

A. My father.

Q. And how long did he farm it?

A. I think our first written leases were about 1929, some 30 years ago, close to 30 years ago.

* * * * * * *

[fol. 4436] Q. How many acres do you have altogether?

A. Roughly 60 to 65, somewhere in that neighborhood.

Q. I mean acres on Indian land.

A. That is what I meant.

Q. On the Indian reservation?

A. 60 to 65.

* * * * * * *

[fol. 4439] Cross examination.

By Mr. Lazarus:

* * * * * * *

[fol. 4440] Q. This lease marked Exhibit No. 176 for identification, this is the one lease that has your name on it, am I correct?

A. That is right, yes.

Q. Turning over to the bottom of page 2 of this lease, it says, "It is mutually understood and agreed that this agreement of leasing is made for agricultural purposes including the setting out of orchards upon the leased premises by the joint tenants or the survivor of them, that possession of the leased premises shall be surrendered in case the Tuscarora Indian Nation shall so require."

That is part of your lease, correct?

A. That is evidently what it says.

* * * * * *

[fol. 4441] Q. That is the proposed reservoir area. Do you do any farming in there?

A. None whatsoever.

Q. None at all?

A. Not a bit.

* * * * * * *

[fol. 4445] William Kroening was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * * * *

[fol. 4446] By Mr. Rosenman:

Q. How much land do you farm on the reservation, Mr. Kroening, approximately?

A. About 135 acres.

Q. How long have you farmed land on this reservation?

A. Around 35 years.

Q. And did your father farm before you, any members of your family before you?

A. Yes.

Q. Who, your father?
A. Yes.

[fol. 4453] Cross examination.

By Mr. Lazarus:

Q. Mr. Kroening, do you know the area that is going to be taken or that is proposed to be taken for a reservoir within the reservation?
A. Well, I know it is on the west side of the reservation.
Q. Do you farm any lands in there?
A. No.

[fol. 4453a] Harold K. Mabon was called as a witness and having been first duly sworn, was examined and testified as follows:

[fol. 4453b] Q. Do you lease those 18 acres from some member of the tribe?
A. Yes.
Q. Do you have a written lease or an oral lease?
A. Oral.
Q. And for how long is it?
A. One year.
Q. How long have you farmed land in the reservation?
A. Oh, I should think about 18 or 20 years.
Q. Was it always the same parcel of land, or were there other parcels?
A. Well, I had more a while ago, but I've got only 18 acres now.
Q. What is the largest amount you have ever had?
[fol. 4453c] A. Forty acres.

Q. How much do you pay for this land?
A. Well, I have different prices. I think about $4.00 or $2.00 an acre, something around that.

[fol. 4454] Cross examination.

By Mr. Lazarus:

Q. Do you know the area being taken within the Tuscarora Reservation for the proposed reservoir?

A. Yes.

Q. Do you farm in that area?

A. No.

* * * * * * *

Benjamin Wendt was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

* * * * * * *

[fol. 4455] Q. Do you work a farm on the Reservation, on the Tuscarora Reservation?

A. Just a piece I have been going to finish up that we got through my uncle, finish up the lease. And my son worked it, and he is going to give up farming, and I am going to finish up—all through.

Q. Do you lease the land, a parcel of land now?

A. I do.

Q. Is it an oral lease or a written lease?

A. Written lease.

Q. Have you got the lease with you?

A. No.

Q. How long have you worked land on the Reservation?

A. For myself?

Q. First for yourself, yes.

A. First for myself. Off and on a piece. That is with my son, I helped to get my son started farming. Oh, gosh, I don't know, 20 years, more or less.

Q. Did your father do any farming on the Reservation [fol. 4456] before that?

A. Oh, yes.

Q. How long did he farm on the Indian reservation?
A. All his life.

. . . . . .

[fol. 4461] Cross examination.

By Mr. Lazarus:

Q. You are a parttime farmer, you say?
A. That is right.
Q. Do you farm any land in the Tuscarora Reservation that is supposed to be covered by the proposed reservoir?
A. No.

. . . . . .

[fol. 4463] A. Russell Tryon was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Chace:

Q. Would you state your name and address?
A. A. Russell Tryon, T-r-y-o-n, 187 Niagara Street, Buffalo, New York.
Q. What is your occupation, Mr. Tryon?
A. Town planning consultant.
Q. And you are employed by the Town of Lewiston for that purpose?
A. Yes, sir.

. . . . . .

[fol. 4466] Q. Now have examined Exhibit 161, which is generally the original reservoir proposal?
A. Yes.
Q. You are familiar with 161?
A. Yes, that is right.
Q. And have you also examined 165, which is the alternate reservoir, excluding the Tuscarora Reservation?
A. Yes, sir.

Q. Now in line with your duties, what would you say with respect to the effect of 165 on development in the Town of Lewiston?

Mr. Lazarus: Objection, Your Honor. The comparative reservoir sites, either cost or availability, are not before this Commission for determination. The only thing before the Commission for determination is whether the proposed license which is shown on 161 will interfere or be inconsistent with the purpose for which the Tuscarora Reservation was established. Any testimony from this witness [fol. 4467] with respect to any other proposed reservoir site is irrelevant and outside of the scope of the hearing. Therefore—

Presiding Examiner: Your objection will be noted, but the witness may answer.

Mr. Lazarus: This is, now, a continuing objection to all testimony of this witness on that subject.

Presiding Examiner: It will be so noted, Mr. Lazarus.

The Witness: The alternate proposal—when I first saw it, I practically threw up my hands. I mean, we had been working with difficult situations prior to that, but when the alternate solution came along it seemed as though we were trying to plan a town that was completely dismembered.

I suppose planners, they like to think they are orderly people, they like to think they are engineers usually, and they like to think in an orderly manner, and you try to get a town planned so it works in an orderly way. Well in the beginning we had a town that had a large Indian reservation in the middle of it. It caused some rather difficult problems, but it was there and it was part of our problem. Suddenly we had open channels or conduits interrupting part of the community. Now suddenly we have a reservoir that is proposed to, not only go from the Indian reservation, but completely through that southern boundary of the Town of Lewiston and into the Town of Niagara.

Our preliminary sewer analysis—the normal topograph- [fol. 4468] ical features in the town dictated the flow, flow lines, as being westerly towards the river and northerly. Our proposals that came along the southern section of the

town, and what we call the Saunders Settlement Road section, the sewer line that would flow, the water line that will go out to Saunders Settlement Road, the sewer lines that flow out through there—all of a sudden this community is going to end up with a segment of its township separated by a reservoir completely. Since the reservoir goes into the adjacent town we have no access through there at all except to go around. And from an engineering standpoint, in servicing this with utilities, it is going to be an extremely difficult situation if we don't at least have a corridor along the southern boundary of the Town of Lewiston to take sewerage out, to connect water into the Sanborn area, which is in the southeasterly section of the Town of Lewiston. We were further concerned with the fact that the town has certain responsibilities, its school buses pick up children, it needs good communications, it has road clearing, snow clearance responsibilities. And if any of you came from that area today, you know we have a lot of snow up there, it is deep. The plows have to go around these roads, and they should at least have a contiguous area within their own boundaries with which to service their own streets. The same thing goes for our fire protection in the town. I would say that from a planning standpoint it is going to make it very, very difficult [fol. 4469] to plan adequate street systems for the town if it is dismembered to this point. It is going to make it difficult to form sewer districts and water districts because they are so far away from the developed areas that we might connect into, and they will be separated by the reservoir now so that I see almost no possibilities of going through the normal planning stages that we could have if something like this would not have come up.

Q. Now this would terminate, as you understand it, the use of Saunders Settlement Road between Lewiston and points east?

A. Yes, sir.

Q. And would leave Upper Mountain Road on the north and Lockport Road on the south as the two nearest east-west highways, is that correct?

A. That is correct.

Q. And would you think that that would interfere with normal development of the area, both west and east of the reservoir, if this alternative site were used?

[fol. 4470] A. I think its most serious effect would be to the east of the reservoir because that particular section, being in the township, depends upon the township for its services. The westerly area would not be so serious because its principal communications, some of its communications at least, are north and south, and they would still maintain themselves. But if you develop that area, you need the major movement through there. If we are going to put a reservoir through there, certainly you do not need a road to serve the reservoir, but normally we would have had at least one or two east-west major streets in the section where there now will be none.

Q. And do I understand that with this proposed alternate site, it would be necessary to take all utilities around the Indian Reservation and then to the north—sewerage, for instance?

A. I see no other solution unless they could make some possible negotiation with the city of Niagara Falls or the town of Niagara, and that does not look too—actually, the topography slopes in the other direction. Our normal directional lines of flow are in the other direction, and there is a serious problem in excavation on this upper level up here because of the rock. Excessive costs would be incurred if you had to excavate such deep sewer lines as to get the fall.

Q. Do you know whether in establishing a sewer or water [fol. 4471] district in a town there must be a demonstrable base to support a bond issue?

A. Yes, it does. I mean, actually a town, to form a water district or a sewer district, has to have sufficient assessed value before they can undertake the project, bond it to whatever it would cost. I mean, depending on the cost they have to have the bonding, based on their valuation.

Q. Does the consent of the Controller of the State of New York have to be obtained?

A. It does.

Q. And does he refuse to give his consent unless there is an adequate base for bond issue?

A. I have never known one to be granted without these requirements having been fulfilled.

Q. Now there is a school at the corner of Military and Saunders Settlement Road, Colonial Village School. Are you acquainted with that?

A. Yes.

Q. Is that a comparatively new school?

A. Yes.

Q. And that is in the alternate reservoir area?

A. That is right.

* * * * * * *

[fol. 4484] Cross examination.

By Mr. Moore:

Q. Mr. Tryon, I think you have already testified that you appeared at the hearings conducted by the Commission a year ago, approximately a year ago—testified to that?

A. Yes.

Mr. Moore: Before I go on, Mr. Examiner, I would like to have marked for identification a new map.

Presiding Examiner: Mr. Moore, describe it for the record.

Mr. Moore: Basically, Your Honor, it is Exhibit 165, but superimposed on a part of the covered conduit, approximately from the railroad and the Town of Niagara to the Forbay of Tuscarora pump generating station there is some green color, which is not on 165. And there is also some green color from the Tuscarora pump generating station going in a westerly direction to the Lewiston power plant itself.

Presiding Examiner: It will be marked Exhibit 202 for identification.

(The document referred to was marked for identification as Exhibit No. 202.)

[fol. 4485] By Mr. Moore:

Q. Do you recall, Mr. Tryon, a year ago, among the issues being considered in the hearing before the Examiner was

the type of water conduit, or the type of waterway, which would be built?

A. Yes.

Q. Do you recall that from a point approximately near New York Central Railroad, going 6,000 feet or so, very close to 6,000 feet in a northerly direction to the Tuscarora pump generating station, the Power Authority's plan was to have an open canal?

A. Yes.

Q. And then another open canal from that point down to the Lewiston power plant?

A. Yes.

Q. Now will you look at Exhibit 202 for Identification and tell me if the green line on the exhibit superimposed on the waterway indicates what the Authority planned to be an open canal?

A. As near as I can tell that looks to be the same one that was on before.

Q. I beg your pardon?

A. It looks to be the same one that was on before.

Q. Being considered a year ago you mean?

A. That is right.

[fol. 4486] Q. Now do you recall what the action of the Commission was with respect to that particular 6,000 feet of waterway? That is the last 6,000 feet of waterway before you get to the Tuscarora pump generating Forbay?

A. Do I recall what the action of the Commission was?

Q. Of the Commission was?

A. Only from what I read in the papers afterwards.

Mr. Moore: I think the Examiner will take judicial notice that the Commission required the Authority to change its plan and make a covered conduit where there had previously been an open waterway.

By Mr. Moore:

Q. And do you recall that among the reasons advanced by the town of Lewiston for asking the Commission to require the Authority to cover it was—well, let me ask you this, I will try to reframe that question without starting

all over: Do you recall what the objections were of the town of Lewiston to an open waterway in that area?

A. They were numerous. I do not recall all of them.

Q. All right. Now if you will look at Exhibit 202, is it true that the alternate plan of the reservoir, so-called, blocks off just about the same area of the town of Lewiston in a north-south direction as would have been blocked off by the open waterway?

A. Very similar.

[fol. 4487] Q. Do you recall also the Authority proposed to build a bridge across the open waterway at Witmer Road which runs into Saunders Settlement Road?

A. I think it was requested by the town, but I do not know whether the Authority agreed to build it or not.

Q. Isn't it indicated on Exhibit 202 for Identification? The red line crossing the green line?

A. Does that indicate the Authority is going to—

Q. I cannot answer your question that way. But I am asking you if you remember that is what happened?

A. I remember the discussion, yes.

Q. All right. Now I ask you to look at Exhibit 202 for Identification and ask you for what comments you have on the effect of the proposed alternate reservoir as far as traffic is concerned, for instance, and compare it with what the effect would have been had the waterway been open?

A. Will you rephrase that question, please?

Q. Well, I am afraid you have a legitimate complaint. I would like you to look at 202, Exhibit 202, and I would like you to keep in mind as you look at it the Authority's proposal that a green line, the waterway, shown in green, the last 6,000 feet of it, would be an open waterway. Then I will ask you to keep in mind also what Exhibit 202 shows with respect to the location of the alternate reservoir in the town of Lewiston. Having looked at those two, and [fol. 4488] keeping those two elements in mind and looking at the exhibit, would you tell me what, in your judgment, would be the effect on traffic of the alternate reservoir in relation to what would have been the effect on traffic of an open waterway?

A. Well, if this reservoir is to be built this way, and to come down into Wheatfield, take the rest of the southern part of Lewiston here, I think it probably inserts some new considerations into this thing. I would not care to comment on what they are going to be right now.

Q. Let me put it this way: Would the situation be better or worse to have the alternate plan of reservoir or to have the open waterway? Assuming either to be an evil, which do you consider to be the worst evil from the traffic point of view?

A. The reservoir.

Q. Now how about it from a sewer point of view?

A. The reservoir.

Q. How about it from the water point of view, that is, the furnishing of water?

A. The reservoir is a block to anything that you would extend from any services from the west into this area. It was my understanding that the Authority could, the Authority had agreed to take care of getting lines over, under or through the canal or over the conduits. Those things had been resolved.

[fol. 4489] Q. That is the open waterway, you mean?

A. Yes.

Q. The Authority would have built—

A. The problems of sewerage and water, I think, had been discussed, and there was general agreement on what was to be done. But to tackle a body of water this long, it would be out of the question.

Q. You are saying that at the hearing last year the Authority had indicated it could put water lines across the open canal?

A. That is right.

Q. And put sewer lines across or under the open canal, but that cannot be done with respect to the reservoir, is that right?

A. I don't know how.

Q. How about the school bus situation and the fire protection situation?

A. You can combat the canal with a span, but you cannot do it with the lake.

Q. Well do you think it would be fair to say that if the

alternate reservoir, as indicated on 202 were built—I withdraw the question because it calls for a conclusion, and I do not think it is fair.

Mr. Moore: That is all I have.

Presiding Examiner: Are there other questions of this [fol. 4490] witness? Do you have another question, Mr. Chace?

Mr. Chace: Just one further question.

Redirect examination.

By Mr. Chace:

Q. Mr. Tryon, what effect would this have on surface water drainage, this alternate reservoir? Have you studied that question?

A. Well, there again I am not just sure what possible solution the Power Authority could come up with that would compensate for the interruption of the natural flow lines here.

Q. There is an interruption of those natural flow lines by this alternate proposal?

A. That is correct, the natural flow lines would be interrupted.

Q. And they are to the west generally?

A. That is correct. I am particularly conscious of that because the school that is further up Saunders Settlement Road, the new junior-senior high school in the town of Lewiston, the drainage problem there we gave considerable study to because we did the site work all around it, we did everything outside of the building on that job, and we actually found that with increased development in an area like that the flood level of that creek that goes by the new school up there would be increased considerably. Once you start building in an area, the fields no longer [fol. 4491] soak up the water and you have a fast runoff factor. And we actually got together with the architect, and I think in that particular school building raised the floor elevation some three or four feet because of the runoff area that affected it, and this is the same problem. Because

it is relatively flat down through here and surface drainage is a consideration.

. . . . . .

[fol. 4499] WILLIAM H. LATHAM resumed the stand and testified further as follows:

Redirect examination (continued).

By Mr. Rosenman:

Q. Mr. Latham, I believe you testified that there were two meetings that were had with the Indians, were there not, the Indian nation?

A. There were two general council meetings.

Q. One of them was before we had floated our temporary loan at least, wasn't it?

A. Yes, it was.

Q. As a matter of fact, before we actually had the license?

A. That is right.

Q. And the other was after we had the license?

A. Yes.

Q. Is there any question as to the definiteness of the offer which was made at the second meeting?

Mr. Lazarus: Objection, that calls for a conclusion.

Presiding Examiner: Objection overruled.

The Witness: I was at the meeting, I could see there was no ambiguity whatsoever.

By Mr. Rosenman:

[fol. 4500] Q. And that was after we had made our original borrowing, was it not?

A. That is right.

Q. And is your testimony the same with respect to the other items of the offer?

A. That is right.

Q. And I think you testified, in answer to a question by Mr. Landy, that so far as you know that had not been formally withdrawn?

A. That is right.

Q. Now, had there ever been any attempts made to do what was suggested by one of the chiefs here, of sitting across the table?

A. The Indians had every opportunity to arrange for such a meeting if they had indicated any receptiveness whatsoever. We made numerous attempts to get together with them. They would give us no consideration to discuss the matter at all.

Q. At the time of the second meeting with the general council, that was set up by Mr. Lazarus, was it not?

A. I understand so.

Q. Did we ask that the entire tribe be there other than just the chiefs?

A. I don't recall. I was not in on the arrangements on that.

[fol. 4501] Q. Don't you know that it was Mr. Lazarus who suggested that the entire tribe ought to be there, rather than just—that the entire nation ought to be there, rather than just the chiefs?

A. I understand that was the case.

. . . . . .

[fol. 4506] Q. I show you Exhibit 191 in evidence, pages 40 and 41 thereof. Are you familiar with that?

A. Yes.

Q. You notice this large red section marked "Reservoir"?

A. Yes.

Q. Can you tell whether covers lands of the Tuscarora Reservation?

A. That runs into the lands of the Tuscarora Reservation.

Q. I show you a map on page 43. You notice a red section there marked "Reservoir"?

A. Yes.

Q. Can you tell whether of not that includes land of the Tuscarora Reservation?

A. It would.

Q. What do you mean "It would"?

[fol. 4507] A. Well, if the reservation line were shown on that map it would intrude into the reservoir.

Q. You have had some experience, have you not, Mr. Latham, in moving houses in connection with the St. Lawrence and Niagara projects?

A. Yes, we have had considerable.

Q. Have you had similar experience before that?

A. I have been connected with such experience otherwise, yes.

Q. How many years would you say you have been connected with moving of houses?

A. Oh, about 30.

Q. Thirty years?

A. Yes.

Q. Have you already moved some houses in the Niagara project?

A. Yes, we have completed the moving—I forget—of 72, or some such figure, houses from the city of Niagara Falls into the town of Niagara.

Q. Those houses are located near the intake?

A. They were in the way of the conduit, a short distance from the intake.

Q. And as I understand it, you picked up, or you had trucks or some contract to pick up, 72 of those and move them to a new site outside the city of Niagara Falls?

[fol. 4508] A. That is right.

Q. That site was acquired by purchase, was it?

A. It was acquired by purchase.

Q. Could you tell us what would be involved in the way of time in moving some 445 buildings in the alternate reservoir shown on Exhibit 189?

A. Including the acquisition of land, if it is possible to procure the land for such purpose, the preparation of site and moving of buildings, I do not see how it could be done in less than two and a half to possibly three years.

Q. Do you mean after you acquired the site would it take that long to move those homes?

A. No, after the site is acquired, I would say about two and a half years for site preparation and moving the houses.

Q. In order to move the houses to the new site, wherever it is, would roads have to be constructed for that purpose?

A. Probably special haul roads would have to be built for that job, depending upon the location.

Q. Will you describe generally what is involved in picking up a house and moving it?

A. The type of equipment we use requires that the I-beams be inserted underneath the house through holes cut in the upper foundation, and the rig for lifting the houses is a U-shaped special equipment built on the order of a fork lift only very much larger, lifting a capacity of 50 [fol. 4509] to 100 tons. The house is picked up on this rig and moved off the foundation. If the new location is in close proximity, it is rolled directly to the new location and set on the previously prepared foundation.

Q. Are you familiar with the school on that alternate reservoir?

A. Yes.

Q. Would it be possible to move the school?

A. It would not be practical.

Q. The school would have to be demolished?

A. That is right.

* * * * * * *

[fol. 4516] By Mr. Lazarus:

Q. Mr. Latham, on redirect we looked at a map in Exhibit 191. In the upper lefthand corner on page 40 there is a large pink area marked "Reservoir". Anywhere in it does it say "Tuscarora Reservation"?

A. No specific indication is made.

Q. I see. Does the word "Tuscarora" appear on the map in any place?

A. The word does not appear on the map.

[fol. 4517] Q. Does the word "reservation" appear in any place?

A. The word "reservation" does not appear in any place.

Q. Is there any identification by words of the dividing line between the town of Lewiston and the town of Niagara? By words?

A. No, there is no such identification.

Q. On the map on page 43 there is also a little pink blob marked "Reservoir"?

A. Yes.

Q. Does it anywhere indicate that part of that reservoir will be in the Tuscarora Reservation?

A. It would be obvious to anyone familiar with the area.

Q. I asked you, does it anywhere indicate on the map that part of the Tuscarora Reservation would be in that reservoir?

A. There is no specific indication.

Q. Do the words "Tuscarora Reservation" appear on the map?

A. They do not.

* * * * * * *

[fol. 4525] Recross examination.

By Mr. Hobbs:

Q. Mr. Latham, I believe Mr. Lazarus asked you if your were advised as to what the Indians wanted, or knew what the Indians wanted, and I am not sure I understood your answer to that question. Did you know what the Indians wanted in connection with negotiations for the price of land?

A. The Indians never gave us any indication of what price they would like for their land. They have merely insisted they do not want to part with it for any price.

Q. Now, what type of houses did you move along the conduits of this project?

A. They were mostly small frame houses, a story and a half. There were some brick ranch type houses.

Q. And did the Authority acquire the lot and prepare foundations for the houses before they moved them?

A. They acquired the property, we acquired the property and we prepared the site by constructing some surface utilities, foundations and roads and sidewalks.

Q. Now, have you made any arrangement such as that in connection with the percentage of homes which you have testified it was possible to move on the Indian reservation [fol. 4526] to be covered by the proposed reservoir?

A. We have told the Indians we would make such arrangements for them if they would indicate where they wanted houses put in some practical location.

Q. Well, within the reservation?

A. Within the reservation, yes.

Q. Now, have you made any such arrangement as that

with respect to the 439 homes shown in the alternate scheme on Exhibit 165?

A. We have made no such arrangement on them as yet.

Q. And I believe you testified it would not be practical to move the school. How about the church, one church?

A. The church might be movable. I have not examined it sufficiently to determine.

Q. And the two cemeteries?

A. The cemeteries could be moved. That is, the graves unquestionably could be moved, they would have to be moved.

Q. Have you made any plans for moving that?

A. No.

Q. And the store and home, the one store and home shown on the Exhibit 189 in the alternate proposal, have you made any plans with respect to moving that store and relocating it?

A. No.

Q. Have you prepared any cost estimate for moving those 439 homes, the one church, two cemeteries and one store? [fol. 4527] A. Our cost estimate on that alternate site contemplates simply as to the homes, store and so forth, the value of the property. If it is decided or agreed to move those buildings in general the cost of relocation would increase the cost of that property. Generally the cost of new property, the preparation of site, moving and so forth, runs higher than the actual value of the house moved.

Q. When you say your cost estimate, what cost estimate do you refer to?

A. The estimate put in the record here by Mr. Thorne, our appraiser.

Q. That does not include moving these improvements?

A. That figure did not contemplate moving. That was simply the value of the property.

Q. Improved property, is that correct?

A. All the property.

Q. Including the improvements?

A. Yes.

Mr. Hobbs: I believe that is all I have.

Presiding Examiner: Mr. Chace, do you have some questions?

Mr. Chace: Yes, I did have a few.

Recross examination.

By Mr. Chace:

Q. Mr. Latham, yesterday you were going to obtain some figures for me. I wonder if you have them now?

[fol. 4528] A. That is as to the acreage, the apportionment of the acreage in the alternate area between the towns?

Q. Yes, that was the first item.

A. The area in the town of Lewiston would be about 1,152 acres, within the crosshatched area indicated on Exhibit 189 by 1,721 acres total between the two towns.

Q. So there would be then 610 acres—620 acres in the town of Niagara, is that correct?

A. 569 in the town of Niagara.

Q. 569. And what about the number of houses in the town of Lewiston, did you make a determination of that?

A. I don't have the figure on that, but I think Mr. Shaw will be able to give you that. I am not sure.

Q. Someone else, anyway, will have those figures available?

A. I believe so.

Q. And how much land was involved in transmission areas in addition to the 1,695 acres shown on Exhibit 189 of the original reservoir layout?

A. The 1,695 acres in the original reservoir layout was all reservoir. That is the dike line.

Q. That is right.

A. And the additional transmission line outside of that, and I don't have the exact figure on that. The total acreage in the town of Lewiston in the original plan outside the [fol. 4529] Tuscarora Reservation was about 3,000 acres for the project.

Q. 3,050 I think is what you gave me yesterday on that.

A. 3,050 or thereabouts.

Q. And that does include transmission line areas?

A. That includes transmission lines, power plant and spoil area. All the incidentals.

Q. Is one of the reasons for moving houses, Mr. Latham, to provide housing accommodations for those who would

otherwise be displaced and have to find somewhere other accommodations if the houses were destroyed?

A. The primary purpose of moving the houses is to keep the houses and not create a housing shortage in the community, to maintain the people in the community.

Q. Are you sufficiently familiar with the situation in that area to say whether there are houses available to the extent of 439 into which the occupants could move?

A. I don't believe such houses exist in that area.

Q. As a matter of fact, do you know of any quantity of houses for rent or sale in that immediate area?

A. The market in that area is very tight.

Mr. Chace: That is all.

Recross examination.

By Mr. Landy:

Q. Mr. Latham, yesterday before lunch I asked you to estimate in terms of dollars the various facets of the offer [fol. 4530] set forth in Exhibit 198. Have you done that?

A. Roughly, in addition to the basic property value and including the cost of the work of moving houses, relocating them, basic improvements and so forth, the aggregate would be about $2,400,000.

Q. Well, does the $2,400,000 include the $1,500,000 for the 1,383 acres, or exclude it?

A. It includes it.

Q. So the $2,400,000 is the overall figure?

A. That is right.

Q. On the basis of the testimony in reference to the negotiation for cheap power, did anyone make a proper study of the Power Authority Act as to whether or not the Power Authority could under that statute sell cheap power to the Indians that you know of?

A. It is my understanding it can be done, but I am not a lawyer; I could not give you the legal justification or clearance on it.

Q. Your understanding is that some study was made?

A. It is my understanding it can be done legally.

Mr. Landy: That is all.

Further Redirect examination.

By Mr. Rosenman:

Q. Mr. Latham, you were asked about this statement by Mr. Moses. Do you recall that statement was to the effect [fol. 4531] that the Power Authority had been jackassed from court to court?

A. From court to court, I think those were the words.

Q. That epitaph was not applied to the Tuscarora Nation, was it?

A. No.

Q. Was it applied to the court?

A. I don't recall that it was applied to any specific individual or organization.

Q. By that time we had been, the Power Authority had been, brought into many courts, had it not?

A. It had.

Mr. Lazarus: Mr. Latham is not a lawyer.

By Mr. Rosenman:

Q. Had it?

A. It had been—

Mr. Lazarus: I object to the question, Your Honor. That is a matter of public record—

Mr. Rosenman: Mr. Latham knows what courts we were in. I want to explain the background of that statement.

Presiding Examiner: He probably testified in them, so chances are he knows the various courts they were in.

By Mr. Rosenman:

Q. At that time we had been in the Southern and U.S. Court of the Southern District of New York, had we not? [fol. 4532] A. We had.

Q. Was that at the instigation of the Nation?

A. As far as I know.

Q. And then it had been transferred up to the District Court in Buffalo, had it not?

A. Yes.

Q. Then do you recall that there was a hearing in the Circuit Court of Appeals for the Second Circuit in Hartford?

A. I am not familiar with the location. I know there was one down there some place.

Q. And then immediately before the statement, as I understand your testimony, we were in the District Court of the Western District located in Rochester?

A. I was there.

Q. And is that the time, to the best of your recollection, when this statement was included in Mr. Moses' statement?

A. It was about that time.

Q. I show you again this Exhibit 191. Mr. Lazarus asked you whether there were any lines to indicate where the reservation was or anything about Tuscarora. Are there any property lines on that map at all?

A. No property lines.

Q. Could anyone tell by the names of the streets and the other areas there that this was Indian reservation land, or part of it was?

[fol. 4533] A. By relating that area to the principal roads, it would be obvious that the Tuscarora Reservation would be partially in the pink area.

Q. One further question about moving houses. Has it been your experience that locating a site and preparing the foundation and building haul roads and then moving the house is more expensive or less expensive than to buy the house and destroy it?

A. It is generally more expensive.

. . . . . .

Further Recross examination.

Mr. Lazarus: May I have 191 again, please?

By Mr. Lazarus:

[fol. 4534] Q. Mr. Latham, how long have you been familiar with the Niagara Falls-Lewiston Niagara area? Since you started to work on this project?

A. A little over two years.

Q. Did you ever live in the area before that?

A. No.

Q. Ever work in the area before that?

A. No.

Q. If before that I told you Witmer Road, would you think of the Tuscarora Reservation?

A. You are talking about before two years ago?

Q. Yes.

A. No.

Q. If I told you about Saunders Settlement Road, would you think Tuscarora Reservation?

A. No.

Q. What are some of the other roads Garlow Road?

A. I had no familiarity with the area before two years ago.

Q. Upper Mountain Road?

A. No.

Q. Niagara University?

A. No.

Q. In other words, if I had shown you this map two years ago and you had looked at it, would you know that the [fol. 4535] reservoir included the Tuscarora Reservation?

A. Two years ago I would have known

Q. More than two years ago, before you came to work on the project?

A. No.

[fol. 4544] George M. Straw was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

[fol. 4547] Q. Does this envelope, Exhibit 203, which has just been received, also contain a key map?

A. Yes, it contains a key map.

Q. Will you describe it, please?

A. This map shows the outline of the area of the proposed reservoir within the Tuscarora reservation. It shows

Moyer Road and Mount Hope running in a generally west to east direction through the center of it, and Garlow Road in a generally north and south direction toward the westerly end of the area.

Q. In each picture, the house taken on each photograph is designated by number as to locality, is it not?

A. Each house is indicated by a dot, and a number is [fol. 4548] connected to it which is the same number that appears on the photograph of that particular property.

Q. How many buildings or houses are there within the reservoir area?

A. We find 37 occupied houses and one house that does not have its roof enclosed and apparently is vacant.

Q. What is the general condition of these houses?

A. They vary in their general condition. There are about 12 of them that are substantial homes. The others are somewhat more modest.

Q. And how many substantial barns are there in the reservoir site?

A. There is one very good barn and one greenhouse.

Q. And is that barn the one connected with Chief Patterson's house?

A. It is Chief Patterson's home, yes.

. . . . . .

[fol. 4549] Q. Can you tell us what is contained in Exhibit 204 for identification?

A. This envelope contains a number of photographs of houses within the Tuscarora reservation outside of the proposed reservoir area.

Q. How many such houses are there?

A. We counted 180 of them.

Q. One hundred what?

A. 180.

Q. 180 houses? Is that inside and outside the reservoir?

A. That is correct. The 180 includes all of the houses, 145 outside of the area.

Q. And that is by actual count?

A. That is by count from the air.

. . . . . .

[fol. 4552] Q. Have you noticed trailer sites on the reservation?

A. Yes, I have.

Q. How many separate trailer sites are there?

A. I counted 15 groups of trailers with sites containing anywhere from 2 to 81. The sites contain anywhere from 2 trailers to 81 trailers. They vary in size.

Q. When did you make this count?

A. I made this count last Saturday.

Q. Last Saturday?

A. Yes.

Q. How many trailers as distinguished from trailer sites did you find on the reservation?

A. I counted 180 trailers.

Q. 180 trailers?

A. Yes.

Q. Did these trailers have foundations? Will you describe what the trailers looked like?

A. The trailers—of course, the word "trailer" is a little unfortunate. These are what is known as mobile homes and are of considerable value. The formal sites where we have groups of from say 5 to 15 appear to have concrete slab foundations; the largest site of 81 trailers that I counted has concrete slabs for the trailers and has sub-systems for the disposal of sewage.

I am not familiar with it so I cannot give you details.

[fol. 4553] Q. You say you have noticed only one that has sewage disposal facilities?

A. The large one, I know does.

There is one on the corner of Saunders Settlement Road, west of Walmore Road—it is on Walmore Road and north of Saunders Settlement Road—that is being developed as a trailer site. I could not count the number of sites because of the snow, but they are putting in very extensive improvements there for the development of that site.

Q. That is the one at which place?

A. That is a site where we found five trailers already installed and sites for many more.

Q. Perhaps you had better read into the record the location of these trailer sites.

A. All right, sir.

Q. And the number of trailers there?

A. We started our trip on Upper Mountain Road and headed east through the reservation. The first site we found was on Garlow Road at the intersection of Upper Mountain Road.

Presiding Examiner: Mr. Shaw, were you driving then?

The Witness: We were driving in a car.

We found two trailers. Site No. 2 is on the north side of Upper Mountain Road just east of Garlow Road, and that had ten trailers. Site No. 3 is also on Upper Mountain Road on the south side. It is a few hundred yards east of Site [fol. 4554] No. 1, above, and has 15 trailers.

Site No. 4 is also on Upper Mountain Road on the north side, about one-half mile east of a gas station owned and operated by one of the Indians. That had two trailers. Site No. 5 is on the north side of Upper Mountain Road, about a hundred yards east of Site 4. That had 10 trailers.

Site No. 6 was directly across the road from Site 5, which is on the south side of Upper Mountain Road and had 5 trailers.

Site No. 7 is at the Indian Mission Church on Walmore Road, the east side of Walmore Road, and had 2 trailers, one on the side and one back of the church.

Site No. 8 is on the east side of Walmore, just north of the Indian school at Mount Hope Road. That had 7 trailers.

Site No. 9 was on Mount Hope Road, the south side just west of Chew Road. This had 81 trailers already located.

Site No. 10 is on Upper Mountain Road, just opposite the large trailer site known as No. 9, and with one trailer.

Site No. 11 is on the north side of Mount Hope Road, just east of the Site No. 9. This had 7 trailers. Site No. 12 is on Mount Hope Road on the south side just east of Site No. 11. That had 7 trailers.

Site No. 12 is on the south side of Mount Hope Road, just east of 11, and had 7 trailers.

Site No. 13 is on the east side of Chew Road, just south of [fol. 4555] Mount Hope Road intersection, and there we had 9 trailers.

Site 14 is on the west side of Walmore Road, just north of Saunders Settlement Road, and this site has 5 trailers in existence and is being prepared for a good many more.

Because of the snow, I could not count the number of possible sites.

Site No. 15 is on Mount Hope Road just south of the little store and tavern, and that has 5 trailers. That site can be identified further as being a little bit west of the gymnasium of the Tuscaroras.

By Mr. Rosenman:

Q. Have you covered all the sites?

A. Yes.

Q. Are you familiar with the general price of these mobile homes, as you call them?

A. Only by conversations. I have heard various prices put on them by some of the men in our engineering forces. I know some of the values.

Q. How valuable are they?

Mr. Lazarus: He has just said he has only heard by hearsay. I object to the question.

By Mr. Rosenman:

Q. Do you know anything about the cost of these foundations?

A. Well, you have to lay a slab of concrete, which is [fol. 4556] somewhat larger than the trailers.

The trailers run 25 feet long by 10 feet wide.

Q. How long are the trailers?

A. Some of them are easily 25 to 40 feet long by 10 feet wide, so that the development of the trailer site, the sewage and what not, while I am not an engineer, I know it would be substantial.

Q. Do you know, are any of these mobile homes occupied by members of the nation?

A. I do not know of any, no.

Q. They are lived in by white people, are they not?

A. Apparently so. I do not know the ownership of them. I do not know who owns them.

Q. I am talking about the occupants.

A. The occupants I saw the day I was out there, of course it was quite cold, were all white people.

Mr. Rosenman: That is all of this witness.

Presiding Examiner: Do you have any questions, Mr. Lazarus?

Cross examination.

By Mr. Lazarus:

Q. Just one or two.

Mr. Shaw, how do you tell the difference between a white person and an Indian in cold weather?

A. Well, some of them, it would not be difficult. In other [fol. 4557] cases it would be quite difficult in cold or warm weather.

Q. So that you really do not know who occupies these trailers in terms of membership in the nation or not?

A. No, I do not.

Q. These trailer camps, I notice you have taken all these pictures from the air. Are any of the camps located in the proposed reservoir area?

In other words, the 1383 acres?

A. No, sir.

Q. No trailer camps in the area which the Power Authority wants to acquire?

A. I did not find any, no, sir.

Mr. Lazarus: No more questions.

Mr. Rosenman: May I interrupt? I neglected to offer this in evidence. First, may I have a number?

Presiding Examiner: I marked it, Judge, Exhibit 205 for identification.

(The document referred to was marked Exhibit 205 for identification.)

Mr. Rosenman: That is an envelope, Mr. Examiner, entitled "Trailers on Reservation."

Further direct examination.

By Mr. Rosenman:

Q. Will you state what this envelope contains, Mr. Shaw? It has a No. 205 for identification. Will you state what the [fol. 4558] contents are?

A. It contains 10 photographs of the key map, sir.

Q. The key map indicates what?

A. The key map indicates the location of the aircraft at the time the picture was taken.

Q. And the pictures show the trailer sites and trailers which you have described in your testimony.

A. Yes.

OFFER IN EVIDENCE AND OBJECTION THERETO

Mr. Rosenman: I offer 205 for identification in evidence.

Mr. Lazarus: It has already been objected to.

PRESIDING EXAMINER: Objection is overruled. It will be received.

(The document referred to, heretofore marked Exhibit 205 for identification was received in evidence.)

* * * * * * *

[fol. 4562] WALTER C. LEVY was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. Dr. Levy, will you give your full name?

A. Walter C. Levy, New York State Department of Health.

* * * * * * *

[fol. 4563] Q. What is your occupation, Doctor?

A. I am a physician, Public Health physician with the New York State Department of Health. My position is Assistant Director of the Division of Local Health Services.

[fol. 4564] Q. And in connection with your duties, do you have to do with the furnishing of health assistance to the Tuscarora Indian reservation in Niagara County?

A. Yes. Our division is responsible for the coordination and the provision, administration, supervision, and provision of a limited degree of medical service, and the super-

vision of public health services on all the reservations of the state, including the Tuscarora.

Q. Will you tell us what the New York State Health Department does, healthwise, with respect to the Tuscarora reservation?

A. As far as medical services are concerned, we employ a physician part-time who conducts general medical clinics at the regular intervals weekly on the reservation for ambulent patients who can come to his clinic. That is without reference to financial need. In an emergency he will also provide an emergency kind of service to indigent or medically indigent Indians if they call him. He will come to their homes or they can come to his office. We also employ a registered nurse who assists the physician at the conduct of the clinics and on the days on which the clinic is conducted she will make some home visits for nursing care and nursing instruction.

The State Health Department furnishes or purchases the medical supplies, equipment, and materials for this general clinic, furnishes, purchases and the physician distributes the [fol. 4565] drugs which are used in connection with this medical clinic.

Q. Does that physician and that nurse whom you employ have any other duties which they perform for the Health Department other than those which they perform in connection with these Indians?

A. She is the same nurse who is employed in the Tonawanda reservation, so one day she is at the Tuscarora reservation and two days a week at the Tonawanda reservation.

Q. Employed by the State strictly to deal with Indians?

A. On a per diem basis.

Q. And the doctor the same way?

A. He is employed for that specific purpose.

That is the only occasion for his employment by the State Department.

Q. On the Tuscarora reservation?

A. Yes, he works only on the Tuscarora reservation.

Q. Who pays for the services, Doctor, that you have described?

A. The State Department of Health through its budgeted allotment.

Q. That is money which the State raises by taxation. It does not come from the Federal Government?

A. That is right.

. . . . . .

[fol. 4570] Mr. Moore: In the first place, we will show, Your Honor, that the purpose for which this reservation was established was to provide these Tuscarora Indians with a place to live. That is one purpose. Another purpose was to provide them with a place to carry on agricultaral pursuits to the extent they want to carry on agricultural pursuits.

. . . . . .

[fol. 4572] Q. Does the Federal Government furnish any health facilities on the Tuscarora reservation?

A. No.

Q. As far as you know has it at any time in history?

A. Not that I know of.

Q. But it does out West, is that right, sir?

A. Yes, it does.

Q. In the Indian reservations in the so-called Indian country the Federal Government furnishes health facilities, is that right?

A. Right.

Presiding Examiner: There, Mr. Mooré, they furnish medical facilities such as he has testified the State of New York furnishes here.

Mr. Mooré: I want to point out, Your Honor, in New York State it has always been the State which has done it.

. . . . . .

[fol. 4573] Cross examination:

By Mr. Lazarus:

. . . . . .

[fol. 4582] Q. Now the services that are provided by the [fol. 4583] State for Indians on the Tuscarora reservation, these medical services you have described, are any services provided by the Town or the County?

A. The Town provides public health services. There is a part-time local health officer—Dr. Alderman lives in Lewiston—who is responsible for public health activities on the reservation, although Dr. Piozza, who is a physician employed for the work on the reservation does some of the immunization work.

Q. Does the County provide any services?

A. Yes, they have a nursing service which after the first of January, will have one nurse, a public health nurse, who will make home visits on the Tuscarora reservation.

Q. Are these the same types of service that the Town and the County provide for other residents off the reservation?

A. Well, there are no medical services provided for any persons in Niagara County outside the Indian reservation, but the public health services are essentially the same.

Q. Now the same service is being provided by the Town and County, then, on the reservation as off the reservation, is that it, and then you provide a special service?

A. That is right.

Q. Now is the service provided by you in any way equalled or is there any comparable service provided for non-Indians in the state?

[fol. 4584] A. No, the State Department of Health does not furnish any medical care for any other group than the Indians.

Q. Other than the Indians. This is the equivalent—

A. That is, as I explained, a relatively limited service.

* * * * * * *

Mr. Moore: Just one question, Mr. Examiner, please: Could the conditions of the Tuscarora Indians, healthwise, be improved?

The Witness: Yes, I am sure they could.

Mr. Lazarus: One more question for me.

Could the health conditions of every community in the United States be improved?

The Witness: Yes.

* * * * * * *

[fol. 4596] Recross examination.

By Mr. Hobbs:

Q. Doctor, what contact do you have with representatives [fol. 4597] of the Secretary of Interior in your work in Indian reservations in New York State?

A. I think—I do not believe there has been any. There was a period of time, just when the transfer for health services for Indians' medical care was transferred from the Department of Indian Affairs, Bureau of Indian Affairs, I guess they call it, in the Department of the Interior to the Department of Health, Education and Welfare, the Public Health Service. And at that time there were several conferences, and I think some people from the Bureau of Indian Affairs met with people from the Public Health Service. And since New York State is a State which has Indians, we were invited to come to that kind of a conference and I was present at that. But it was very casual, and I do not remember any names any more.

Q. Do you have reference to the United States Department of Health and Welfare?

A. Well, it is Health, Education and Welfare, and Public Health Service now is in charge of medical and health services for Indians.

Q. Well, does the United States Department of Health, Education and Welfare provide any medical and health service to the Tuscarora tribe, do you know?

A. No, no Indians in New York State.

Q. Do you know why that is?

A. I guess it is historical and traditional. They never [fol. 4598] have provided any medical or health service to Indians in New York State in the Federal Government, even when it was in the Department of Interior.

Mr. Hobbs: That is all I have.

Presiding Examiner: Any other questions?

Thank you, Doctor. You may be excused.

(Witness excused.)

Mr. Moore: Mr. Shapiro.

Whereupon, Bernard Shapiro was called as a witness and, after being first duly sworn, was examined and testified as follows:—

Mr. Lazarus: What is the purpose of calling this witness?

Direct examination.

By Mr. Moore:

Q. What is your full name, please?

A. Bernard Shapiro.

Q. Where do you work?

A. I am Associate Director of the Bureau of Public Assistance in the New York State Department of Social Welfare.

. . . . . .

fol. 4601 Q. Mr. Shapiro, what is your job, in layman's language, in the Department of Social Welfare?

A. I am responsible for program planning and supervision of the programs of home relief, and to disabled veterans' assistance and State charges. Now the State charges are those persons for whom the State reimburses the local public welfare departments 100 per cent, and fol. 4602 there are various groups who come under this State charge program. One of these groups are Indians on reservations.

Q. And you have charge of the relief which is given to these State charges, is that right?

A. That is correct.

Q. All right. And you are familiar with the records which the Department keeps in respect to these activities, is that right?

A. Yes, we have records.

Q. And are you familiar, in particular, with the record which the Department keeps, and work which it does, in connection with the Tuscarora Indian Reservation in Niagara County?

A. We have records. Let me amplify that a bit, that in New York State the Public Welfare, the local public welfare departments, county, city, town, administer as-

sistance and services to needy persons. However, with respect to State charges, the State reimburses 100 per cent to those localities, whereas, in regard to other programs, they are reimbursed in different percentages, some relief 50 per cent, Federal Old Age Assistance, Aid to Blind, Aid to Disabled, State and Federal together runs to about 75 per cent.

Q. So that there is a federal program of old age assistance for the blind, but there is no federal program of assistance to the Indians, is that right, as such?

[fol. 4603] A. As such there is not.

Q. All right. So with respect to the Tuscarora Indians, your department, the State through your department, reimburses local communities 100 per cent for whatever is done for the Indians, is that right?

A. Whatever is done for Indians on reservations.

Q. Now will you tell us what your records show with respect to the Tuscarora Reservation?

A. With respect to the Tuscaroras, the assistance which is given through Niagara County, the total number of persons—let me explain that, it is a monthly average of the total number of persons who received assistance during the year 1957—was 88 persons.

Q. Out of how many, can you tell us that?

A. The best figure we have been able to get on the population of the Tuscaroras is 634.

Q. Is that a census figure?

A. That is the 1950 census figure.

Q. So last year you had an average of 88, is that right?

A. Eighty-eight.

Q. What kind of help was that?

A. That 88 is broken down, 27 monthly average for home relief, five in old age assistance, 39 aid to dependent children, no blind, three aid to disabled, one adult institutional care, 12 child welfare and one hospital only.

[fol. 4604] Q. Can you tell us how much the State spent on those programs last year?

A. The State spent a total of $24,848 in the year 1957, which is broken down $23,879 assistance and $969 hospital care.

Q. Can you tell us for how many years, or at least how far back, the State has been extending aid to the Indians as such in New York State?

A. Well, the State Board of Charities was established in 1873, so that historically, of course, it appears from reading history that the State has always assisted the Indians in one way or another. However, organized relief as such under the State Board of Charities did not begin until 1873 when the Board was established. The earliest formal record that I have been able to find is in the Poor Law. And the Poor Law goes back to 1896. I have the Poor Law of 1909, which defines the Indian poor person. Of course, you must remember in those days we did not have the type of organized relief that we had after 1930 when there was a mass depression, and all the various programs of social benefits came into the picture.

Q. Wasn't there a State appropriation going back as early as 1856 for Indians?

A. That I think can be found in history books

. . . . . .

[fol. 4627] Further direct examination.

By Mr. Moore:

Q. There is a Miss Wayne in the Department of Social Welfare?

A. Yes.

Q. Will you tell us what her job is, her full name and job?

[fol. 4628] A. Her name is Miss Helen Wayne, and her title is Supervisor of Indian Affairs.

Q. She, in effect, is an Indian agent, is that right, employed by your department?

A. Well, we do not call her an agent, because agent is something else. She is a member of our department. She is a supervisor of social work who is detailed to handle the problems of Indians.

She helps Indian families, advises, guides them in educational and vocational planning and so on. As a matter of fact, I recently had a meeting with two professors from one of the near-by colleges who were doing a study on Indians, and I invited Helen Wayne to join me. The first thing

Helen Wayne asked them is whether they would not establish a scholarship in that university for the Indians.

Q. So the state has a person assigned to the welfare of Indians, but the Federal Government, as far as you know, does not, is that right?

A. The Federal Government has never had anything to do with Indians as far as social welfare is concerned, to my knowledge.

* * * * * * *

[fol. 4630] WALTER A. LE BARON was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. What is your name, sir?

A. My name is Walter A. Le Baron.

Q. Where do you live?

A. I live in Schenectady, New York.

* * * * * * *

[fol. 4631] Q. You are an official of the New York State Education Department at Albany?

A. Yes, sir.

Q. What is your title, your job?

A. I am Chief of the Bureau of Elementary School Supervision, and our Bureau is responsible for supervision of all elementary schools in the State.

In addition, the education of Indian children on reservations, which is a responsibility of the State Education Department, has been assigned to our Bureau by the Commission since 1941.

Q. You have special duties with respect to Indians, children who live on Indian reservations, is that right?

A. Yes.

Q. Are you familiar with the Tuscarora Indian Reservation?

A. Not too familiar with it in detail.

Q. You have been there?

A. Yes, familiar with the Indian education problems.

Q. That is what we are interested in.

A. Yes.

Q. Will you tell us what the State does with respect to the education of children on the Tuscarora Reservation?

A. The State provides the education for all children on the Tuscarora Reservation. We carry out our responsi-
[fol. 4632] bilities through contract with Niagara Wheatfield Central School since 1956. Prior to that we actually operated the Indian school on the reservation and did contract with Niagara Falls for the education of the secondary school children. Now under this contract they provide the education and we reimburse them for it.

Q. That is the Niagara Wheatfield School District does?

A. Yes, the central school district.

Q. And the State reimburses the school district 100 per cent, is that it?

A. One hundred per cent.

Q. In other words, the State pays the total cost of the education of the Indian children?

A. That is correct.

Q. Is there a school on the reservation?

A. Yes, there is.

Q. I show you picture number 3869 of Exhibit No. 204 and ask you whether or not that is the school?

A. Yes, sir, that is the school.

Q. Who built it?

A. It was built by the State Education Department, State of New York.

Q. Who paid for it?

A. The State of New York.

Q. How much did it cost?

[fol. 4633] A. The cost of the building was $515,550.

Q. When was it built?

A. The building was completed in 1954.

Q. Is the school used today?

A. It is.

Q. And it is operated pursuant to contract with that school district you told us about?

A. That is correct. It is leased to the school district.

Q. Leased to the school and the school district provides the teachers?

A. They provide the entire staff.

Q. And pays the teachers? And then the State reimburses, is that?

A. That is correct.

Q. How many grades are in this school on the reservation?

A. There is a kindergarten and six grades within the building.

Q. And what children go to that, just Indian children from the reservation?

A. Yes.

Q. Or are there others?

A. Indian children.

Q. What school do the children above the sixth grade attend?

[fol. 4634] A. The Niagara Wheatfield Central School. There are a total of 80 of them in the Niagara Wheatfield Central School.

Then Niagara Wheatfield in turn contracts with Niagara Falls for 11 of them to attend the vocational school and three to attend the high school.

I might explain that that is under a plan we developed that when we entered into this contract, we would not remove any youngsters from the high school they were presently attending, but allow them to continue and graduate or leave from those schools.

Q. That accounts for the three of the Niagara Falls City High Schools?

A. That is correct.

* * * * * * *

[fol. 4636] Q. Does the Federal Government give any assistance whatever in educating the children on the Tuscarora Reservation?

[fol. 4637] A. None that I know of.

Q. The State carries the whole load?

A. The State does.

Q. It always has?

A. As far as I know.

Q. Do you know how far back the State's education of Indian children goes?

A. The first appropriation by the State which was by the Legislature for education of Indians on reservations, was in 1946.

Q. 1946?

A. 1946.

Q. Since that time the State has been doing whatever educating was done on the Indian reservation within its borders, is that right?

A. Other than done by charitable organizations and that sort of thing.

Q. Private?

A. Private.

Mr. Moore: That is all.

* * * * * * * *

[fol. 4642] HENRY D. SHELDON was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Give your full name to the stenographer, please.

A. Henry D. Sheldon.

Mr. Lazarus: What is the purpose for which he is being called?

Mr. Rosenman: Census.

By Mr. Rosenman:

Q. What is your occupation, Mr. Sheldon?

A. I am a statistician with the Bureau of the Census.

Q. And how long have you been with the Bureau of the Census?

[fol. 4643] A. With a year's interruption, since 1942.

Q. That is in the U. S. Department of Commerce, is it not?

A. Yes.

Q. Are you familiar with the records maintained by the Bureau of Census?

A. Reasonably so. My work is primarily with the records.

Q. I show you a pamphlet of the U. S. Department of Commerce, Bureau of the Census entitled "Current Population Reports, Special Census" dated March 24, 1958. Are you familiar with that document?

A. I am, indeed.

Mr. Rosenman: May I ask the Examiner to give it a number for identification?

Presiding Examiner: It will be marked Exhibit 206 for identification.

(The document referred to was marked Exhibit 206 for identification.)

By Mr. Rosenman:

Q. Was this a special census taken by the Bureau?

A. This was a special census taken by the Bureau as of April 1st, 1957, at the request and expense of Niagara County, excluding Lockport City.

Q. And it includes the Tuscarora Indian reservation, does [fol. 4644] it not?

A. It does include the reservation.

Mr. Rosenman: Mr. Examiner, instead of marking this whole thing in evidence, I would like to read into the record only two lines of it.

On page 1, the last line of that page:

"Tuscarora Indian reservation"—

Does this give the population, Table 1, Mr. Sheldon?

The Witness: This does give the total population, yes.

Mr. Rosenman: Tuscarora Indian reservation total—I assume that means total population, does it?

The Witness: Total population, right.

By Mr. Rosenman:

Q. 944. Then that is broken down into white and non-white and into male and female, and the white males are 134, the white females, 77. The non-white males, 354, the non-white females, 379.

Now what does the next column indicate, Mr. Sheldon?

A. Simply a comparison of the total population.

Well, it is the total population figure for 1950.

Q. That next number, 634, represents the total population as of April 1, 1950, does it not?

A. Yes.

Q. Showing an increase from April 1st, 1950, to April 1st, 1957 in number of 310 and in percentage of 48.9.

[fol. 4645] Now on page 10, perhaps that whole page I would like to have received in evidence, Mr. Examiner, because that is concerned with the age, race, and sex for the reservation, and it breaks down also the non-white into Negro and other races.

Presiding Examiner: Do you want to read that into evidence, Judge, or do you just want that particular page?

Mr. Rosenman: I would like to read the top line and then maybe the rest will just be marked in evidence.

The rest is a breakdown by age. The top line on page 10 indicates that on the Tuscarora Indian reservation there was a total of 944 of all ages and sexes. That was broken down into 488 males, 456 females of which the white population was a total of 211, all ages, all sexes, broken down into 134 males, 77 females.

The non-white was a total of both sexes, all ages, 733 broken down into 354 males, 379 females.

The Negro population of the non-white consisted of 10 males and no females, and other races consisted of 344 males, 379 females.

By Mr. Rosenman:

Q. That item, Mr. Sheldon, of other races would be Indians, would it not?

A. The category "other races" includes Indians, Japanese, Chinese, Filipinos and other small racial groups.

It is a reasonable presumption here that most of these [fol. 4646] people are Indians.

Q. There isn't any indication in this pamphlet of any of the other racial groups other than Negroes.

A. No.

Q. And Indians, is there?

A. No, there is not.

Mr. Rosenman: The balance of that page I don't think is important enough, Mr. Examiner, to mark or read into the record.

Presiding Examiner: You have got another item there, Judge, which says, "Other Races." What do you mean by those? Mr. Sheldon, would that "Other Races" be where you put the people that—

The Witness: The major racial groups that fall into that are Indians, Chinese, Japanese, Filipino, Eskimo, Malay, if you have any, and so on.

I was saying the reasonable presumption in this area is that most of these people are Indians, or all of them.

Presiding Examiner: Thank you.

By Mr. Rosenman:

Q. I show you a document entitled "1954 Census of Agriculture, Niagara County," dated November, 1957, Prepared by C. A. Bratton, Department of Agricultural Economics, New York State College of Agriculture, a Unit of the State University of New York, Cornell University, Ithaca, New York.

[fol. 4647] Are you familiar with that document?

A. I am familiar with the document and I have examined it.

Q. Will you tell us briefly what it is?

A. This is a compilation of figures from the census of agriculture conducted by the Bureau of the Census.

Primarily, three censuses are involved, 1930, 1945, and 1954. There are really two sets of tables here, those that show the agricultural characteristics of farms for Niagara County and those that show similar statistics for the towns within Niagara County, including the Tuscarora Indian reservation, those are the minor civil divisions. The statistics for Niagara County as such are drawn from the published reports of the censuses of agriculture for these respective years.

The statistics for the towns or minor civil divisions are based on special tabulations which were made at the Bureau of the census but never published as such, but furnished to groups such as the group that published this one and many of them were issued in local bulletins of this type.

Q. In other words, the underlying figures all come from the Bureau of the Census, do they not?

A. That is right.

Mr. Rosenman: I ask the Examiner to give this a number for identification.

Presiding Examiner: It will be marked Exhibit 207 for [fol. 4648] identification.

(The document referred to was marked Exhibit 207 for identification.)

Mr. Rosenman: I would like to read some items of this into the record instead of reading the whole thing. I would like to start on page 8.

You will notice that the last of the names under townships is the Tuscarora Indian reservation.

Mr. Lazarus: Your Honor, at this point I object.

The use to which the Tuscarora reservation is put is not material to the purpose for which it was created or acquired, nor to the effect the proposed reservoir will have upon it.

Therefore, I object to further reading of these figures into the record as irrelevant.

Presiding Examiner: Objection is overruled.

Mr. Rosenman: The Examiner will notice we have underscored on these pages "Tuscarora Indian Reservation."

On page 8 the table sets forth the number of farms, and for the Tuscarora Indian reservation it shows for the year 1930, 59 farms, for the year 1945, 99 farms, and for the year 1954, 27 farms.

The last two columns show the percentage of change in 1954 from the previous years, and the percentage of change from 1930 is a minus 54 per cent and the percentage of change from 1945 is a minus 73 per cent.

[fol. 4649] By Mr. Rosenman:

Q. Mr. Sheldon, let me ask you, is 1954 the last agricultural census taken?

A. Yes.

Mr. Rosenman: Next, on page 9, Mr. Examiner, land in farms, this table indicates for the Tuscarora Indian reser-

vation in 1930, 4,001 acres, in 1945, 3,883 acres, in 1954, 2,866 acres.

The next two columns show a percentage of change, and indicate that in 1954 the percentage of change from 1930 was minus 28 per cent and the percentage of change from 1945 was a minus 26 per cent.

By Mr. Rosenman:

Q. Mr. Sheldon, let me ask you, these figures have to do with the number of farms and the total land in farms irrespective of who does the farming, do they not?

A. Right, they do.

Mr. Rosenman: The next table on page 9 indicates for the Tuscarora Indian reservation the number of acres per farm.

By Mr. Rosenman:

Q. I suppose that means average acres?

A. Average acres, yes.

Mr. Rosenman: It is called to my attention that in the table "Land and Farms," I neglected to read the number of acres of crop land harvested in 1954 was 607.

[fol. 4650] Returning to the next table entitled "Acres Per Farm and Irrigated Land," it appears that for the Tuscarora Indian reservation for the year 1930 there was 68 acres per farm, in 1945, 39 acres per farm, in 1954, 106 acres per farm.

The percentage of change in 1954 from the year 1930 was a plus 56, and the percentage of change in 1954 from 1945 was a plus 172 per cent.

The number of acres irrigated in 1954 is zero.

The next table on page 10 sets forth the number of farms reporting milk cows. For the Tuscarora Indian reservation for the year 1945 there was 16, for the year 1954 there were 6. The percentage of change, 1954 from 1945 was minus 62, and the number of farms reporting milk sold in 1954 was one.

The next table on page 10 is the number of milk cows. For the Tuscarora Indian reservation, it shows for the year

1945, 55 milk cows, for the year 1954, 26 milk cows, showing a percentage of change, 1954 from 1945 of minus 53 per cent.

The next table is farms reporting poultry. For the Tuscarora Indian reservation the number of farms reporting chickens on hand for 1945 is indicated as 59, for 1954, 13, showing a percentage of change, 1954 from 1945 of minus 78.

Then there is tabulated in the same table the number of farms reporting in 1954 eggs sold, indicating that there were 3 such farms, broilers sold, indicating there were no such farms, and turkeys raised, indicating there were three. [fol. 4651] The next table is the number of chickens on hand for the Tuscarora Indian reservation. It shows for 1945, 3,184, and for 1954, 485, showing a percentage of change to 1954 from 1945 of minus 85 per cent.

The next table on page 13 shows the acreage of wheat and oats in 1954. For the Tuscarora Indian reservation, it indicates that for the commodity of wheat the farms reporting were 6 in number, comprising 174 acres. With respect to oats, the number of farms reporting was 4, comprising 133 acres.

The next table shows the acreage of corn in 1954. For the Tuscarora Indian reservation there were 5 such farms, comprising 85 acres. That is for all kinds of corn.

This is then broken down into corn for grain. The farms reporting were 5 in number, and the acreage was 85.

The next table is the acreage of dry beans and potatoes, 1954. For the Tuscarora Indian reservation, there were two such farms reporting.

By Mr. Rosenman:

Q. For dry beans, what does that indicate for the acreage, that asterjsk?

A. Since there were less than three farms, the amount of dry beans is not published to avoid disclosure.

Mr. Rosenman: For potatoes, in 1954, there was one farm reporting with the acreage undisclosed.

So far as selected vegetables are concerned, that is the [fol. 4652] next table, 1954. The Tuscarora Indian reservation indicated that there were no farms reporting vegetables, and this is broken down into green beans, green lima

beans, broccoli, indicating there were no such farms reporting.

This also appears from the next table with respect to cabbage, cauliflower, sweet corn, cucumbers and pickles, that is that there were no farms reporting such commodities.

That is also true of other selected vegetables set forth in the next table, green peas, sweet peppers, and pimientos, squash and tomatoes; that is, no farms and no acreage.

With respect to strawberries in 1954 on the Tuscarora Indian reservation, there were four such farms reporting with a total acreage of 3.4 acres and the production was 3,480 quarts.

The next table on page 18 shows the land in fruit for the Tuscarora Indian reservation.

In 1944 there were 40 farms reporting and in 1954, 15 farms, showing a percentage of change from 1944 to 1954 of minus 62 per cent.

The acreage involved in these farms was in 1944, 259 acres, in 1954, 135 acres, showing a decrease of 48 per cent.

This fruit is broken down into apples, sour cherries, sweet cherries, peaches, pears, plums, and prunes and grapes, and unless the Examiner wishes, I won't read those into the record.

[fol. 4653] By Mr. Rosenman:

Q. Did you, pursuant to my request, prepare a table of population of Tuscarora Indian Reservation by race and sex in 1950?

A. Yes.

Q. Based upon the census record in your office?

A. We did.

Mr. Lazaras: I do not have this one, Judge.

Mr. Rosenman: I will give it to you.

Mr. Examiner, I only have five copies of this. Mr. Sheldon just produced them, but we will have some made for tomorrow.

May I ask that this be given a number?

Presiding Examiner: It will be marked Exhibit 208, Judge.

(The document referred to was marked Exhibit 208 for Identification.)

Mr. Rosenman: May I read this into the record?

Presiding Examiner: Yes.

Mr. Rosenman: This shows in 1950 a total population of all classes of 634 comprising 30 white and 604 Indians.

This was broken down into male and female, as follows: All classes, 314 male, 320 female. As to the white population, there were 18 male and 12 female. As to the Indian population, there were 296 males and 308 females.

Should this be received in evidence? I have read it into [fol. 4654] the record.

Presiding Examiner: It will be received.

(The document referred to, heretofore marked Exhibit 208 for identification was received in evidence.)

Mr. Lazarus: Has this table been given a number?

Presiding Examiner: 208 is the copy of the Population Census for 1950, Mr. Lazarus.

By Mr. Rosenman:

Q. Did you also prepare at my request a table of employment on the reservation of persons 14 years old and over?

A. We prepared such a table.

Q. And was this taken from Census Bureau figures?

A. Yes, this was compiled from the schedules for the reservation for the 1950 census.

Q. Is this the table that I showed you headed "Department of Commerce Bureau of the Census"?

A. Yes.

Mr. Rosenman: May I ask that this be received in evidence?

Presiding Examiner: It will be marked Exhibit 209 for identification.

(The document referred to was marked Exhibit 209 for Identification.)

Presiding Examiner: It will be received in evidence.

(The document referred to, heretofore marked for Iden- [fol. 4655] tification Exhibit 209 was received in evidence.)

Mr. Rosenman: May I just read two lines?

Mr. Lazarus: It is in evidence, Judge.

Mr. Rosenman: I would like to read the first and second lines, Your Honor.

Presiding Examiner: Proceed, Judge.

Mr. Rosenman: It shows that the total persons 14 years old and over employed who live on the reservation total, all classes, 152.

This number is broken down into 120 male, 32 female, and this again is broken down into white and Indian. There is 17 total white men employed broken down into 15 male and 2 female, and 135 Indians employed as a total broken down into 105 male and 30 female.

Of these employed in agriculture, forestry and fisheries, there were a total of 28, broken down into 25 males and 3 females.

This in turn is broken down into white, none, and into Indian, the same numbers, 28, 25, and 3.

By Mr. Rosenman:

Q. These figures apply only to people who actually live on the reservation, do they not?

A. That is right.

Q. Does this letter refresh your recollection as to other statistics which were requested from the Bureau of the [fol. 4656] Census?

A. Yes.

Q. Can you state, having had your recollection refreshed, what the total Indian farm operators there were in the Tuscarora reservation?

A. Well, this letter is one which states the number of acres in the farms operated by Indian farm operators.

Q. The other figures that we had were all farms, were they not?

A. Yes.

Q. The other figures that you gave us?

A. You mean the figures from this document?

Q. From the agricultural census.

A. Yes.

Q. They were all farm lands, is that right?

A. Yes.

Q. And does this indicate how many of the farmlands, how many acres of farmlands were operated by Indians?

A. It does.

Q. What was the total acreage? What year is this?

A. This is from the 1954 census of agriculture. The total number of acres in the farms operated by Indians was 2,788.

Of this acreage, 1,835 were in crop lands and 134 acres in fruit orchards and these figures are totals for Niagara [fol. 4657] County, including the common lands of the reservation.

Q. You say for all of Niagara County?

A. No, this is for all of Niagara County.

Q. The figures you just gave us?

A. Yes, as the letter states here. It is for Niagara County.

Q. Oh, you mean fruit orchards?

A. As I recall this letter, it applies to all Indian operators in Niagara County and not to the reservation as such.

Q. You mean that this letter where it says "common lands for the Tuscarora reservation," it is all Indian lands in the county, including—

A. Yes, all farms operated by Indians in the county, including those operated on the common lands of the reservation.

Q. Are there any other reservations in Niagara County?

A. To the best of my knowledge, no, though I would not swear to that.

Q. Do you know whether part of the Tonawanda reservation is in Niagara County?

A. I suspect yes, but this is something which I would want to check explicitly before committing myself.

Q. It is in parts of three counties.

A. Parts of three counties.

[fol. 4658] Q. Now do you have similar figures for the year 1950?

Mr. Hobbs: Similar to what, Judge?

Mr. Rosenman: Giving the number of Indian land acreage operated by Indians?

The Witness: These are similar figures for 1950.

Mr. Hobbs: This is the Tuscarora reservation we are talking about.

By Mr. Rosenman:

Q. Do you have figures for 1950 showing Indian operated land?

A. In Niagara County?

Q. In Niagara County.

A. Yes.

Q. Will you state what they are?

A. There were 23 farms operated by Indians. They contained 1880 acres, of which 1016 were crop land.

There were 47 cattle and calves on these 23 farms, and of these 47 cattle, 30 were cows. This is information which was assembled by reviewing the schedules.

Q. And this also applies to all Niagara County?

A. Yes.

Mr. Rosenman: That is all.

Presiding Examiner: Mr. Lazarus?

Cross examination.

By Mr. Lazarus:

[fol. 4659] Q. Mr. Sheldon, looking at Exhibit 208, I see a total figure of Indian population on the Tuscarora reservation in 1950 as 604.

A. Yes.

Q. And looking at No. 206, I see a total non-white population of 354 males and 379 females, which I add up to a total of 733.

A. That is correct.

Q. Now of that 733 non-whites on the reservation in 1957, how many would you estimate are Indians?

A. Well, first, may I refer you to Taole 3, on page 10?

Q. Can you read the answer to my question for me off that table?

A. Yes. You are talking about the 733 which is in the 6th column over under total non-white.

Q. That is right.

A. 733?

Q. Yes.

A. 10 of those according to classifications were Negroes.

Q. And all the rest Indians, you assume?

A. I necessarily assume. I do not know whether there were Chinese, Japanese and so on among them or not. I suspect no.

Q. So that leaves a total of 723 Indians we assume.

A. Yes.

[fol. 4660] Q. Subtracting from that 604 from 1950 we come up with a total of 119, am I correct?

A. Yes.

Q. That means that in the period from 1950 to 1957, a period of what is that, seven years, is it?

A. Yes.

Q. We have had an increase in the Indian population on the Tuscarora reservation of 119?

A. Yes.

Q. Now worked as a per cent of 604, that works out to roughly 20 per cent, does it not?

A. Approximately, yes.

Q. Now based upon your experience with the census, would you say that a 20 per cent increase in a rural area in a seven-year period is high or low?

A. I do not think I would say. That is, when you deal with small areas of this type, you get all kinds of strange and rather sharp changes, sharp declines, sharp rises, and so on.

Q. Let's get at it another way. Has the general rural population of the United States been on the increase or decrease in the past 10 years?

A. Let's say the farm population has clearly decreased. The rural population is complicated by the suburban growth territory, which is still classified as rural.

[fol. 4661] Q. Still if you were to give a figure leaving out rapidly growing subdivisions, but in what would ordinarily be considered a rural area, a farm area, has the population in the last ten years increased or decreased?

A. If it has not decreased, it has certainly not grown very rapidly.

Q. And a 20 per cent increase in a rural area, then, would be considerably above the national norm?

Will you say yes for the record instead of nodding your head?

A. Yes, although I would still add my precaution that for a small area this really doesn't mean very much.

Q. But we are dealing with figures in a small area, and all of the statistics that you have read in have dealt with a small area.

A. Right.

Q. Would you then say that all of the statistics you read into the record are subject to this similar injunction on your part that you are dealing with a short period of time and a small area and therefore we are subject to rapid changes?

A. I would be much happier in interpreting these figures if I knew something about the situation on the Tuscarora Indian reservation.

. . . . . .

[fol. 4668] Redirect examination.

By Mr. Rosenman:

Q. Mr. Lazarus asked you to compute the amount of increase in the number of Indians between the two years, 6/34 to 7/23. These tabulations do not indicate which of the Indians are Tuscaroras and which are not, do they?

A. That is correct. These are simply persons classified by the enumerator as Indians.

Q. So you would not know whether these figures are Tuscaroras or other kinds of Indians?

A. That is true.

Q. Were you here when Chief Greene testified on page 4140 of the record that there were 525 Tuscaroras on the land on the entire reservation?

A. I believe I was.

Q. So that 525 would indicate the number of Tuscaroras and the balance would be other tribes?

A. Didn't he also in his testimony give some figure for other non-Tuscarora Indians on the reservation?

Q. I don't recall that he did, but on this page of the record he indicated that the figure of Tuscaroras would be 525.

[fol. 4669] A. Yes.

Q. Now may I ask you to look at the same two exhibits which Mr. Lazarus asked you to look at and compare the increase in the number of whites who live on the reservation, Exhibits 208 and 206. Do you see in 1950 the number of whites, male and female, were 30?

A. Yes.

Q. On Exhibit 208?

A. Yes.

Q. And do you see that in Exhibit 206, which was 7 years later, the number of whites had increased to how many?

A. 211.

Q. That is an increase of about how many per cent?

A. It is 700 per cent, isn't it?

A. 700.

Q. Seven times as many.

A. Yes.

Q. And it would be even worse if you deducted the number of 10 which are included in that figure which represent Negroes, would it not?

A. Yes.

Q. It would be a higher percentage?

A. It would still be a higher percentage.

Mr. Rosenman: That is all.

Recross examination.

[fol. 4670] By Mr. Lazarus:

Q. Mr. Sheldon, do your figures with respect to the white population show whether this is, shall we say, a semi-transient population or a permanent population?

In other words, is it just that they were there at the time the census was taken?

A. We really have no information on that score. These are people who were found there and who told the enumerator they were not temporarily there, or at least they were not visiting and had a usual residence to which they expected to return. They may have been on the move, however.

Mr. Lazarus: No further questions.

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[fol. 4673] HARRY PATTERSON was recalled as a witness and having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Rosenman:

Q. Chief, can you give us the names of your landlords, please, from whom you lease land on the reservation?

A. I rent from Elmer Mt. Pleasant.

Q. E-l-m-e-r (spelling)?

A. Yes.

Q. Elmer Mt. Pleasant.

A. Alberta Mt. Pleasant.

Q. How many acres from Elmer Mt. Pleasant? Do you have the acreage?

A. No, I haven't got the acreage.

[fol. 4674] Q. And from Alberta?

A. Alberta.

Q. Is that his wife?

A. That is right.

Q. Who else?

A. Lyman Johnson, Mrs. Beatrice Gansworth.

Q. That is Mrs. And who else?

A. Mrs. Sarah Dubec, Arthur Chew.

Q. Arthur Chew?

A. Yes.

Q. You do not have the number of acres of each?

A. No, I haven't.

Q. What does Elmer Mt. Pleasant do? Does he work?

A. Yes. He has got a place around there and he works what he can around the place.

Q. Does he work off the reservation?

A. Yes.

Q. Do you know where, at Niagara Falls?

A. No, in farms.

Q. He works on farms off the reservation?

A. Yes.

Q. Alberta is his wife. Lyman Johnson: what does he do?

A. He works uptown. I don't recall where he works.

Q. By uptown, you mean Niagara Falls?

[fol. 4675] A. Niagara Falls, yes, and he has been staying up there.

Q. He lives in Niagara Falls, too?

A. Yes.

Q. He doesn't live on the reservation?

A. No.

Q. Arthur Chew, what does he do?

A. He works. I do not know just where he works.

Q. In Niagara Falls? He works off the reservation.

A. Yes.

Q. Does he live on the reservation, Mr. Chew?

A. Yes.

Q. What about Sarah Dubee, does she live on the reservation?

A. Yes.

Q. And Alberta Mt. Pleasant?

A. Yes.

Q. And Mrs. Gansworth?

A. Yes.

Q. She lives on the reservation?

A. That is right.

Q. The only one that lives off is Lyman Johnson.

A. Yes.

* * * * * * *

[fol. 4678] By Mr. Rosenman:

Q. I wanted to ask you about those trailers, Chief. Do you know the trailers on the reservation? You have heard testimony by Mr. Shaw about the trailers. Were you in court here yesterday when Mr. Shaw testified about the trailers?

Do you know any members of the Tuscaroras that live in trailers?

A. Not in trailers. They live in houses.

Q. I mean these mobile houses. You know what a trailer is?

A. Yes.

Q. Do you know any Tuscarora Indians who live in trail-

[fol. 4679] ers on the reservation?

A. I know of one.

Q. What is his name?
A. Truman Johnson.
Q. He lives in a trailer?
A. Yes.
Q. Where is it?
A. But he has got a house there.
Q. He has a house?
A. Yes.
Q. But he lives in the trailer?
A. That is right.
Q. Who lives in his house?
A. One of the Indian members of the reservation.
Q. You mean he has rented his house to another Indian?
A. Yes.
Q. And he lives in a trailer?
A. That is right.
Q. Where is this trailer?
A. It is off the area.
Q. But is it in the reservation?
A. That is right.

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[fol. 4684] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rosenman: I think the record ought to show, Mr. Examiner, that the last thing that happened on Wednesday before Thanksgiving was that you excused Chief Patterson. He said he wasn't coming back and we didn't expect him to come back. We certainly didn't ask him to come back. I think the Examiner will recall that.

There was a conference at the bench.

Mr. Lazarus: I will accept Judge Rosenman's statement as true if we then strike from the record the two newspaper clippings in 1957 which were brought in to refresh the recollection of this witness, and as soon as they were admitted in evidence, he was excused.

Mr. Moore: What is the point of that?

Mr. Lazarus: The purpose for which those documents were admitted was to refresh the witness' recollection, theoretically, and we found that as soon as they were admitted, according to your own statement, the witness was dismissed. Under those circumstances, I move the exhibits be stricken.

Mr. Rosenman: I cannot understand the point that Mr. Lazarus is making. If he wanted to ask him any questions about it, he can ask him any questions he wants. It is certainly clear in my mind, as I am sure it is in the Examiner's, [fol. 4685] that this witness was excused, not at my request.

I was asked whether I wanted him, and I said no. I think Mr. Lazarus was asked the same thing, and the Chief said he was going up to the reservation and wasn't coming back.

Mr. Lazarus: I think, Your Honor, that the Power Authority has to have it one way. It cannot have it two ways.

If the witness was dismissed, then the exhibits were improperly admitted because they were admitted only for the purpose of refreshing his recollection, and yet he was dismissed as soon as they were admitted. Therefore, they were not used to refresh his recollection.

They have no purpose in the record. Now if it is not the case that the witness was excused, then he was requested to come back and he is entitled to his witness fee.

Mr. Rosenman: We never asked him to come back.

Mr. Hobbs: Mr. Examiner, I do not quite understand what this is all about. The witness is here. He is on the stand, and that is the way it stands.

Mr. Lazarus: What it is about is this, simply this: I want to find out if he was requested to come back or if he was not requested, and was excused.

Counsel for the Power Authority says he was excused. I will accept that statement, and therefore on the basis of that statement he was excused immediately after two exhibits were introduced in evidence for the purpose of re- [fol. 4686] freshing his recollection.

Now they were not used for the purpose of refreshing his recollection.

Therefore, they should be stricken from the record.

That is my motion.

Mr. Hobbs: I would like the record to show that Chief Patterson has been here most, if not all, of this hearing. He was here this morning, and now he is recalled to the witness stand and he is now on the stand.

Presiding Examiner: I would think he would be entitled to witness fees from somebody.

It kind of runs in my mind that somebody asked Chief Patterson if he would bring down some tribal records.

Mr. Rosenman: That is Chief Greene. Mr. Lazarus stipulated that they would be brought down and we subpoenaed Mr. Hill, who got his witness fees, and we paid Chief Greene a witness fee, also.

Mr. Hobbs: Mr. Examiner, in view of your comment, I would like the record to show that I have no objection to Chief Patterson collecting all the witness fees he can.

Presiding Examiner: Chief, what they want you to do now is to meet with Chief Greene and others back there, others of the Chief and get up a list of the names of the people who live—of the Tuscaroras—who live within these 1383 acres.

[fol. 4687] Will you proceed to do that and then come back and report when you have got the names?

Call your next witness.

(Witness temporarily excused.)

Mr. Lazarus: May I have a ruling on my motion to strike those two exhibits that were introduced?

Presiding Examiner: I will reserve it until we get the Chief's testimony in about the names of the Indians who live on this reservation within the area sought to be taken.

* * * * * * *

JOHN J. HILL was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Will you give your full name to the stenographer, please?

A. John J. Hill, Sanborn, New York, Route 2.

[fol. 4688] Q. Are you a Chief, Mr. Hill?

Do we call you Chief Hill?

A. Yes, I am a Chief.

Q. You live on the reservation?

A. I do.

Q. And you are a member of the Tuscarora Nation?

A. That is right.

Q. Do you hold any office in the Nation? Are you the treasurer?

A. I am the treasurer of the nation and in charge of all the enrollment of the nation.

Q. Have you with you the treasury books and the enrollment books?

A. I do.

Q. May I see the enrollment book, please? Will you tell us first how you keep it, what entries you make in it?

A. I keep all the people who are naturally Tuscaroras, registered members of the Tuscarora tribe and register all the newborn whose mothers are registered members of the Tuscarora tribe, and that is the record I have, and I also keep a record of non-Indians residing on our reservation who draw their annuity goods at our Tuscarora reservation once a year.

Q. Do you also record the members who die?

A. Yes, I do.

[fol. 4689] Q. I didn't understand what you said about non-Indian groups.

You keep a record of them when they come on the reservation?

A. That is the members of the New York State Indians who are residing and who are members of our Six Iroquois Confederacy.

Q. You mean who are not Tuscaroras?

A. That is right.

Q. Who are not members of the Tuscaroras?

A. That is right.

Q. You consider a member of the Tuscaroras through the mother, do you not?

A. The mother's side, that is right.

Q. The mother's side.

If she was a Tuscarora, then the children are Tuscaroras?

A. That is right.

Q. If the mother was not a Tuscarora, then they are not Tuscaroras?

A. That is right.

Q. Even though they live on the reservation?

A. That is right.

Q. Do you keep a record of the white people who live on the reservation, the non-Indians?

A. No, I do not.

[fol. 4690] Q. Do your keep this up to date? Do you keep a census?

A. Yes, as the child is born, they drop me a card or come personally to my house and record the birth of the child.

Q. And do you keep it up to date in the sense that you know how many enrolled members there are of the tribe?

A. That is right.

Q. What happens if they leave the reservation to live elsewhere?

A. Their name remains on the roll as registered members.

Q. Under the regulations of your nation, if a member of the reservation lives off the reservation, can he still be an allottee of land on the reservation?

A. Yes, as a member of the Tuscarora tribe, he is entitled to privileges of the Tuscarora Nation.

Q. Is that true, no matter where he lives?

A. That is right.

Q. If he were to move to Niagara Falls and live there, he is still entitled to his allotment of land?

A. That is right.

Q. Can I see this allotment book?

A. I don't have the allotment book.

Q. I'm sorry, the enrollment book. How long have you been the treasurer?

A. I believe it has been about nine years.

[fol. 4691] Q. Who was the treasurer before you?

A. Chief Eli Asa Williams.

Q. Is this the book that you have had for 9 years?

A. No, that is a book that is up to date. You asked me whether I keep an up-to-date book and that is the new book that is made up to date.

Q. You just made these entries recently, didn't you? This isn't your original enrollment book, is it?

A. No, that is not the original one.

Q. Where is that?

A. In 1948 we used to have an Indian Agency in Buffalo,

New York, and he kept the enrollment books, and he had charge of giving out our annual annuities.

In 1948 they abolished that office in Buffalo and he gave me one little typewritten book which he used to distribute the cotton, our annuities, rather, and as far as any official book or cards or whatever system he used of keeping the enrollment, I don't know, and that is the only piece of document that he gave me.

Q. Did he give it to you or to Mr. Williams?

A. He gave it to me.

Q. And when did you make the entries that are in this book that you have shown me?

A. Those have been done over a period of time as I made the new book and transferred the names from the old one [fol. 4692] to that one.

Q. When did you start this new book?

A. That has been started over a year ago.

Q. Where is the book that you had before this?

A. There was no book.

All it was was a typewritten sheet that was used for checking off names as each Indian got his annuities.

Q. What are these annuities you are talking about, Chief?

A. All it amounts to is 2½ yards of bleached cotton muslin that the Government gives to us as part of their living up to their treaties that they have made with us.

Q. The nation gets some bleached muslin?

A. Muslin cloth, that is right.

Q. How much does the nation get, how many yards?

A. 2½ yards apiece.

Q. And you distribute this each year, is that what you mean by annuity?

A. That is right.

Q. Is that all you get from the Federal Government?

A. That is all we get.

Q. Have you made a computation from this book of how many Tuscaroras are now in the reservation?

A. Yes, I have.

Q. How many are there? Do you have that computation [fol. 4693] here?

A. There are 566 registered members of the Tuscarora Nation.

Q. And they are in this book?

A. That is right.

Q. How many non-members of the Tuscarora Nation live on the reservation?

A. 288 non-members living on the reservation.

Q. How many?

A. 288.

Q. They are non-Tuscarora Indians who live on the reservation?

A. That is right.

Q. Now of this number of—

A. 566.

Q. —of 566 registered Tuscaroras, how many of them actually live on the reservation?

A. 413.

Q. 413.

A. That is right.

Q. And that means that 153 live off the reservation?

A. That is right.

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[fol. 4700] Q. Do you get any money at all from the allottees of land as rent of the land?

A. Yes, we do have one parcel of land that is rented out, not continually. A farmer might use it for one year and find out he does not want it the next year so it will lay idle and then we rent it again to someone else.

Q. This is what Chief Greene called the national farm?

A. That is right.

Q. And you rent that to outsiders?

A. That is right.

Q. Do you rent that to—

[fol. 4701] A. We rent it to another Indian.

Q. Do you rent any of that to a white farmer at any time?

A. I cannot recall. As I say, we have the committee who is in charge of renting the land, and who is in charge of collecting the money for it and then bring it over and turn it over to me.

Q. Can you tell from looking at your book how much rent you received in the last fiscal year for that national farm from May 1st, 1957, to May 1st, 1958?

A. From May 1st, 1958, to the present?

Q. From May 1st of 1957 to May 1st of 1958. That is the last full fiscal year.

A. We didn't receive any during that year.

Q. Do you know the name of the farmer that works it now? Isn't it Max Haseley? Doesn't he work the national farm now, or some land on the national farm?

A. As I say, just what parcels of land is rented and who used them, I do not know.

Q. Can you tell us what year you did get some income from this farm? Would your book show the last income you got from the rent of the farm?

A. Yes, in the year of 1956 we got $29.00.

Q. Is that about the income you get each year?

A. That is right.

[fol. 4702] Q. For that farm, $29.00?

A. That is right.

Q. Now can you tell us what property the nation owns on the reservation other than the farm, and the forest? It owns this gymnasium; doesn't it?

A. That is right, it is nation owned.

Q. And does it maintain it? Does it spend money to maintain it as best it can?

A. Yes.

Q. What other community property is there that the nation owns on the reservation?

A. That is all, just the forest lands and that nation farm.

Q. And this community house?

A. And the community house.

Q. Anything else?

A. Not to my knowledge.

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[fol. 4711] Cross examination.

By Mr. Lazarus:

Q. Chief Hill, on your direct examination you mentioned an annuity from the Federal Government. Is this what is known as the Calico Annuity?

A. That is right. Yes, it is.

Q. This comes to you under the treaty of 1794?

A. That is right.

Q. The treaty with George Washington.

Mr. Rosenman: I think this witness is not qualified to testify as to the source of it. I think the treaty would be the best evidence, if there is such a treaty.

Presiding Examiner: That is probably right, but if he knows, Judge—

Mr. Lazarus: I can show how he does know.

By Mr. Lazarus:

Q. Chief Hill, every year do you not, as treasurer of the Nation, receive a letter from the Department of the Interior with respect to the Calico Annuity?

A. That is right.

Q. And does not it tell you—

Mr. Rosenman: Do we have the letter? I think the letter is the best evidence.

Mr. Lazarus: The letters, if you recall, Judge Rosen[fol. 4712] man, were admitted in evidence in the proceeding in the Second Circuit, so I know you are familiar with them. If you want me to, I do not have them with me, but I can bring the letters in.

Mr. Rosenman: Let the record show what you are referring to, which letter. I do not mean now, but at some time.

Mr. Lazarus: All right, I will bring in those letters.

Do you have the exhibits?

Mr. Moore: Is that in your appendix in the District Court?

Mr. Lazarus: Yes.

Mr. Moore: I may have them.

By Mr. Lazarus:

Q. While Mr. Moore is looking for the letter, is it your understanding that this annuity has been paid every year since 1794 to the Tuscarora Nation and members of the other six nations?

A. It has. As long as I remember it has been given once a year.

Q. And isn't there quite a celebration on the reservation when the annuity is distributed each year?

A. Yes, it is a one-day affair, but it is, as you say, a celebration. It is a get-together where we dish out all this muslin cloth.

Q. And is this not a symbol of the special relationship [fol. 4713] between the Tuscarora Nation and the United States?

A. It is.

Q. It represents something coming from the Great White Father, dating back to George Washington's time?

A. That is right.

Q. Has the Department of the Interior ever made any efforts to capitalize that annuity, in other words, to get you to accept money instead of the cloth?

A. Yes, they have.

Q. And has not the nation absolutely refused to do that?

A. They have refused to accept it.

Q. Can you tell us why the nation has refused to take money instead of cloth?

A. Well, we hold to our treaties. We enjoy just the way we are, and actually the money is not needed that much, and it would not amount to enough to make any difference in any way at all. And we would just as soon be getting our measly two and a half yards of cloth a person each year for years to come.

Q. Now with respect to money, Chief Hill, you testified to the balance in the nation's account dating back to 1955. Before this litigation came up in your dispute with the Power Authority has the Tuscarora Nation ever felt any need for more money?

A. No, we have not. We have met every obligation right [fol. 4714] on time and as easy as possible. We have never been in any financial difficulty whatsoever.

Q. So that you would say that although your bank balance is rather modest, your needs are modest, too, and you have always been able to do what you wanted?

A. That is right.

Q. And where the nation has had a project that it wanted to undertake, the nation has been able to undertake that project?

A. To finance it into exactly what we want to do with it.

Q. Chief Hill, you have testified to the fact that there are non-members of the Tuscarora Nation living on the reservation, is that correct?

A. That is right.

Q. Tell me, are your children members of the Tuscarora Nation?

A. No, they are not.

Q. Are Chief Greene's children members of the Tuscarora Nation?

A. No, they are not.

Q. Why aren't they members of the Tuscarora Nation?

A. Because the mothers belong to other tribes of Indians.

Q. I see. So your children are carried on the rolls as non-members of the nation?

[fol. 4715] A. They are not carried on the rolls at all.

Q. I see. But you have a record of them as being non-members living on the reservation?

A. That is right.

Q. How old are your children?

A. Eight and 12.

Q. They live with you, of course?

A. That is right, two daughters.

Q. Is this true of a great number of other Tuscarora Indians, that their children of tender years are not carried on the rolls as members of the nation?

A. That is right.

Q. Suppose a Tuscarora Indian married a non-Indian, say a girl from Niagara Falls, and she came to live on the reservation. Would she be enrolled as a member of the nation?

A. That is a Tuscarora boy marrying—

Q. —a white girl?

A. A white girl. No, she would not be.

Q. Even though she was living on the reservation?

A. That is right, even though she was living there.

Q. And their children, would they be carried as members of the Tuscarora Nation?

A. No, they would not.

Q. Whatever records you would have would show them as non-members?

[fol. 4716] A. That is right.

Q. And if the mother were an Onondaga Indian the children would be listed as other Indians, is that right?

A. They would be listed as Onondaga Indians.

Q. I see. And if the mother were a white person, they would be listed as non-Indians?

A. That is right.

Q. But they all would be members of the family, living on the reservation—

A. That is right.

Q. —the head of the household would be a Tuscarora Indian?

A. That is right.

Q. When a Tuscarora Indian moves to Buffalo, does he lose any rights on the reservation that he had before?

A. No, he does not.

Q. Can he come back any time he wants?

A. He is welcome back any time he wants.

Q. Is the reservation a home base?

A. It is.

Q. Some place to which every Tuscarora Indian can return—

A. That is right.

Q. —if he sees fit? And he will be taken in?

A. That is right.

Q. No matter how far he has roamed or how long he has [fol. 4717] been away?

A. That is right.

Q. Now suppose a Tuscarora girl marries a man from Los Angeles and goes to live in Los Angeles and has some children. Are those children Tuscarora Indians?

A. Those children are Tuscarora Indians.

Q. And they would be enrolled as soon as you found out about them?

A. They would be enrolled as soon as I was notified, naturally, of their birth.

Q. And any time they wanted, their children, now, who were not even born on the reservation, any time they wanted to come back to the reservation and live, couldn't they come?

A. That is right, they are welcome back.

Q. Are you aware that when a citizen of the United States

goes to live in England, he retains his rights of citizenship?

A. That is right.

Q. And if his children are born in England, they are still citizens, too?

A. That is right.

Q. And he can hold property in the United States?

A. Yes, he can.

Q. When he comes back to the United States he is admitted right into the country?

A. That is right.

[fol. 4718] Q. Now isn't that just about the way the Tuscaroras run?

A. Exactly.

Q. Now you also testified to the property owned by the nation, that which you recalled at any rate, and I think you listed the national farm and the gymnasium and the forest, is that correct?

A. That is right.

Q. Now is the swamp just above the taking area, does that belong to the nation?

A. Yes, it does.

Q. Was that included in the lands that you listed? In other words, isn't that in addition to the forest and the national farm?

A. Yes, it is.

Q. It is. And are you aware of any other tribal lands? These are lands owned by the nation that have not yet been assigned.

A. There is similar type of land to that.

Q. You testified also that the original enrollment record that you received back in 1948 came to you from the Indian Agent in Buffalo.

A. That is right.

Q. Was he an employe of the Federal Government or of the State Government?

[fol. 4719] A. Federal Government.

Q. And that agent, up until 1948, kept the roll for the Tuscarora Nation?

A. That is right.

* * * * * * *

[fol. 4725] RAY B. POWELL was called as a witness and, after first being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Chace:

Q. Are you the supervisor of the town of Lewiston, Mr. Powell?

A. I am.

Q. And what is the supervisor of a town in the State of New York?

A. He is the fiscal officer of the town.

Q. He presides at meetings of the town board?

A. That is right.

Q. And has charge of the finances of the town?

A. That is right.

Q. How long have you held that office?

A. This is my eleventh year.

Q. Prior to your becoming supervisor did you hold any other official position in the town of Lewiston?

A. Yes, I was Chairman of the Board of Assessors.

Q. How long were you Chairman of the Board of Assessors?

A. Thirteen years.

[fol. 4726] Q. So that you have held public office in Lewiston for about 24 years?

A. That is right.

Q. And how long have you lived in the town?

A. Sixty-six.

Q. You were born in the town of Lewiston?

A. I was born in the town.

Q. In the same house in which you now live?

A. That is right.

Q. And are you the fourth generation who has lived in that same house?

A. I am.

Q. So your family ties go back a long way in the history of Lewiston?

A. That is right.

Q. Have you been acquainted with the Tuscarora Indian Reservation?

A. I have.

Q. For all your life?

A. All of my life.

Q. Are you acquainted, and have you been acquainted for many years, with many members of the tribe?

A. The elder chiefs I know very well.

Q. Formerly participated in athletics with—

A. Yes, we used to play basketball.

[fol. 4727] Q. Now does the town of Lewiston have any control over the Tuscarora Indian Reservation?

A. None at all.

Q. The town does not collect any taxes or assessments from the reservation?

A. We do not.

Q. Is it subject, that is, is the reservation subject, to zoning or planning regulations?

A. It is not.

Q. Does the town have anything to do with highways on the reservation?

A. We do not. The State has.

Q. Does the county of Niagara have anything—

A. They do not.

Q. In other words, highways are constructed and maintained by the State of New York?

A. That is right.

Q. And is the snow plowed by the State of New York?

A. It is.

Q. Do you know whether some of the Indians vote in town elections?

A. They do. Very few, but some do.

* * * * * * *

[fol. 4729] Q. Now, Mr. Powell, what is the latest population census in the town of Lewiston?

A. We had a special census in 1957, and I believe the figures were 11,855.

Q. Is that exclusive of those residing on the Tuscarora Reservation?

A. It is.

Q. And what was the population in 1950?

A. A little less than 7,000.

Q. Now since that interim census in April of 1957, has there been continued growth of population in Lewiston?

A. There has.

Q. Have you any estimate of the extent?

A. No, I could not.

Q. What is the latest assessment roll in the town of Lewiston? That is, what year was that—

A. For the year—the assessment for 1959 would be $18,515,825.

Q. And is that exclusive of the lands which have already been appropriated by the Power Authority of the State of New York in connection with this project?

A. That is right.

Q. Do you remember what that figure was?

A. That was the amount appropriated for the Authority that was $545,000 in round figures.

[fol. 4730] Q. That has already been taken?

A. That is right.

Q. So that it would be $19,000,000 if that land had not been taken?

A. That is right.

Q. And what is the equalization rate for the current year for the town of Lewiston?

A. Thirty-six per cent.

Q. Does that mean, Mr. Powell, that real estate in the town of Lewiston is assessed on an average of 36 per cent of its full value?

A. That is right.

Q. So that in order to determine what the full value of property taken is, you would divide the assessment by 36 and multiply by 100?

A. That is right. And I would like to make a correction. That is 36 per cent of the year 1940, not '58.

Q. Isn't it the year 1949-52?

A. I am sorry, '49 and '52 instead of '58.

Q. Did the State in 1954 make appraisals and a determination of an equalization rate based on the average appraisals for the year 1949 and 1952?

A. That is right. That is my error.

Q. So that actually on current valuations, can you say whether it would be in excess of that?

[fol. 4731] A. It would be in excess, that is right.

Q. Now have you examined Exhibit 165, which is the alternative reservoir site?

A. Yes.

Q. And 189, which is the one on the easel?

A. Yes.

Q. Do you know how many houses are involved in the alternate site in the town of Lewiston?

A. As now proposed?

Q. Yes.

A. No, I do not.

Q. A total of 439 houses shown on the map includes an area in the town of Niagara as well?

A. That is right.

Q. And we are to be furnished with figures by the Power Authority as to how many are actually in Lewiston.

A. That is right.

Q. Have you made a calculation, Mr. Powell, of what the assessed value of the lands and improvements within that alternative area amount to?

A. I have. It may not be large enough because I did not know where their transmission lines would go, but the taking, as to that map, they would take $1,198,000, in round figures, from our assessed valuation.

Q. That would be then in addition to the $545,000 pre-

[fol. 4732] viously taken?

A. That is right. It would make a total of $1,743,000.

Q. And applying the equalization rate based on 1949-52 values, what would the full value then amount to?

A. I have not figured it out, I am sorry.

Q. Well, is it roughly $3,162,000?

A. I would say.

Q. Strike that. That was on the basis of the $1,200,000 included in the current area. In any event, it is roughly three times what the—

A. That is right, and it would be about 9 per cent of our total valuation.

Q. Now what is the situation in this alternate reservoir site with respect to water distribution?

A. Well, the county, we have a county water district it would be approximately where we would get our supply of water from the county, so that anything east of this taking would be a problem to get water over to them. That is as a water district. That is for two reasons: The valuation to pay for a water district would be taken, and the district with a small valuation would still be left. I do not think they could finance one. And that is the route where our supply of water would travel, is on the land taken.

Q. Is there presently under construction a water line extending out of Saunders Settlement Road from Military [fol. 4733] Road to Colonial Village?

A. There is.

Q. And is Colonial Village just west of the east line of the alternate reservoir site?

A. That is right.

Q. So that if this alternate reservoir were ordered, that water line would be useless?

A. That is right.

Q. And what is the source of water in that—once that line is constructed?

A. The source of water would be from the City of Niagara Falls through an 18-inch line, I believe it is an 18-inch line, that was constructed by the Power Authority. And I believe it is on contract, an agreement, that the county can take that 18-inch line.

[fol. 4734] Q. And would it be feasible, were it not for this alternate reservoir, to extend that line further to the east to serve areas south of the Indian reservation?

A. It was so constructed to do that thing.

Q. And could it serve the hamlet of Sanborn?

A. It could.

Q. Is that in the southeast corner of the town of Lewiston off the map to the top?

A. It is.

Q. Are there a substantial number of residents in that area to the east?

A. There is. It is a good large hamlet.

Q. Is there also a large junior-senior high school on Saunders Settlement between the alternate reservoir and Sanborn?

A. There is, a new one.

Q. That is in addition to the Colonial Village School which is within the alternate-reservoir site?

A. That is right.

Q. Now, to get back to that for just a moment, you gave us some figures on the total assessment of lands being taken under this alternate proposal. Did— Do those include the value of the Colonial Village School?

A. It does not.

Q. Does it include the value of Memorial Park Cemetery?

A. It does not.

[fol. 4735] Q. Or of St. Michael's Roman Catholic Cemetery?

A. It does not.

Q. Is that cemetery on the north side of Saunders Settlement, within the taking area?

A. It is.

Q. Now is there any— Strike that.

Is there any sewerage disposal system presently in existence along the southerly boundary of the town of Lewiston, along Saunders Settlement Road?

A. There is not.

Q. Are there any plans of the county with respect to a sewer district to be countywide?

A. There is a county sewer district survey. We have had our preliminary reports from the engineers. I do not know who. They were from Ann Arbor, Michigan.

Q. Is that generally similar to the county water plan?

A. That is.

Q. But it has not progressed quite as far?

A. It has not progressed as far; that is right.

Q. The county water district has already been created?

A. That is right.

Q. And can you say whether any studies have been made by experts retained by the town of Lewiston with respect to sewer systems?

A. There have been. We have had the engineering firm [fol. 4736] of Krehbiel & Krehbiel, and they have given us a preliminary report on the sewer of Lewiston.

Q. Are you familiar with that preliminary report?

A. I am.

Q. Can you say where they propose to construct sewer lines within the alternate-reservoir site?

A. Yes, they were to start at the village, hamlet of Sanborn, and run along south of the Tuscarora Reservation, towards the west, and then north to the escarpment.

Q. Does the natural flow—or, does the natural surface slope to the west?

A. That is right. That is why the sewer was so planned.

Q. And if a sewer line were extended from the southeast corner of the town of Lewiston in a northerly direction, east of the Tuscarora Reservation, what could you tell us about such a line?

A. There would have to be lift stations installed in the sewer, because it is higher as you go towards the escarpment on that end of the town.

Q. Would that substantially increase the cost of any such system?

A. It would.

Q. Over what it would cost to run it in a westerly direction?

A. As planned now; yes.

[fol. 4737] Q. Now, is there a volunteer fire company located within the alternate-reservoir site?

A. There is one located on the Saunders Settlement Road at Colonial Village.

Q. That would be within the taking area?

A. That would be within the taking area.

Q. How is that identified? What is the name of it, the fire company?

A. It is Lewiston Fire Company No. 2.

Q. Does Lewiston Fire Company No. 2 have another station?

A. They have a substation on what we call the escarpment area, which is north of the present land now taken by the authority for the reservoir.

Q. And close to the west boundary of the Tuscarora Reservation?

A. That is right.

Q. That is on Upper Mountain Road?

A. That is on Upper Mountain Road.

Q. Is that a small station?

A. That is a private garage with a small fire engine in it.

Q. What about the main station? Does that have more than one fire engine?

A. That is right. They have a fog, an up-to-date fog rig. They have also a water tank, a large water tank there.

[fol. 4738] Q. In addition to a—

A. Regular fire engine. That is right.

Q. How is the Lewiston Number 2 Company staffed?

A. It is staffed by volunteer firemen from Colonial Village area in what is known as the escarpment area. If this proposed was taken, we would lose not only the fire hall but 60 of the volunteer firemen. It would only leave 25 on the escarpment.

Q. Does the hamlet of Sanborn—do they have a volunteer company also?

A. They have a volunteer company of their own known as Sanborn No. 1.

Q. And does that company cover the area east of, oh, the Walmore Road?

A. Approximately; that is right.

Q. Do these companies also furnish protection on the Tuscarora Indian Reservation?

A. They do.

Q. Is that on a purely voluntary basis?

A. Purely voluntary basis.

Q. The Tuscarora Indian Reservation is not part of the fire district?

A. It is not part of the fire district, is right.

Q. Taxes are raised as part of the town levy for fire protection purposes outside of the reservation?

[fol. 4739] A. That is right. And outside of the village of Lewiston.

Q. Now you have already testified that the natural flow of water is to the west.

A. That is right, in this locality.

Q. Would this alternate reservoir site interfere with drainage of property south of the reservation and east of the alternate site?

A. It would.

Q. Unless some definite provision was made to care for it?

A. That is right.

Q. Now, Mr. Powell, did the town of Lewiston participate in the hearings held in this matter last year?

A. We did.

Q. And did the town of Lewiston oppose the proposed taking of the reservoir site shown on Exhibit 189, being partially on the Tuscarora Reservation?

A. We did.

Q. Did we seek a reduction in the size of that reservoir?

A. We did.

[fol. 4740] Q. Did we employ engineers for the purpose of testifying?

A. We did. I believe it was the firm of Sanderson & Porter.

Q. That was in cooperation with the city of Niagara Falls and the town of Niagara?

A. The town of Niagara, that is right.

Q. Did we also oppose an open canal in the towns of Niagara and Lewiston?

A. We did.

Q. Now has the town board considered this Exhibit 189, the alternate reservoir site?

A. I believe that is the one. We had a new one the other day, but I believe that is the one.

Q. Referring now to the easel, the map that is on the easel, Mr. Powell, that is Exhibit 202, is that substantially the same as Exhibit 165, other than for the fact that the conduit areas are shown and open canal areas are shown in green?

A. I would believe so.

Q. In other words, the areas proposed to be taken for this alternate reservoir are the same on that exhibit as they were on 165?

A. I believe so.

Q. And was there a meeting of the town board of the town of Lewiston called to consider this alternate proposal?

A. There was. And—

[fol. 4741] Q. I think at that time the Power Authority had not come forward with a proposal to take as far east as this shows, is that correct?

A. That is what I was going to bring out. It did not take Colonial Village. It came to about the Norsway Farm, as near as we could tell.

Q. Is that just west of Colonial Village?

A. That is right.

Q. And Colonial Village is the largest settled area within this taking?

A. That is right.

Q. So when the town board met, it did not appreciate that there was quite such a large area involved as there presently is?

A. That is right.

Q. And did the town board—what action did the town board take?

A. That we would oppose the taking of more land by whatever means our attorney saw fit.

Q. Do you assume the town board would take similar action with respect to a reservoir of the size shown on Exhibit 202?

A. I am sure of it.

Q. Are you a member of the Board of Supervisors of the county?

[fol. 4742] A. I am.

Q. And is the Board of Supervisors the chief legislative body of the county of Niagara?

A. It is.

Q. And it also exercises some executive functions as well, too, does it not?

A. That is right.

Q. Did the Board of Supervisors take any action on this matter?

A. They did, they passed a resolution at the meeting of November 20.

Q. Would you read that resolution?

A. This is a certified copy of the resolution. It says:

"WHEREAS, by decision of November 14, 1958 the Court of Appeals of the District of Columbia Circuit has remanded to the Federal Power Commission the question as to whether or not use of 1,383 acres of the Tuscarora Indian Reservation as a reservoir will interfere or be

inconsistent with the purpose for which the reservation was created;

and,

"WHEREAS, the Power Authority of the State of New York has announced that the only possible alternative site for a reservoir not involving the use of Tuscarora lands would necessitate the taking of 1,600 acres in the Town of Lewiston and 750 acres in the Town of Niagara;

[fol. 4743] and,

"WHEREAS, such takings would involve the taking of at least 282 residences within those towns, as well as a $1,000,000.00 public school, two cemeteries and substantial commercial developments; and,

"WHEREAS, such takings would drastically affect the orderly development of the County of Niagara by severing Saunders Settlement Road, State Highway No. 31 and the only state highway connecting the County Seat of Lockport with Lewiston and Niagara Falls, thus placing a serious added burden upon Upper Mountain Road and Lockport Road, with no east-west road between them for a distance of upwards of 3½ miles; and

"WHEREAS, the County of Niagara has recently established the Niagara County Water District for the purpose of servicing the rural areas of the County with water, the plan of distribution of which would be seriously interfered with by the existence of this body of water, extending about 3½ miles from north to south and 2 miles from east to west; and

"WHEREAS, plans are likewise being contemplated for a county sewer district, which district would be impeded in development by the alternative reservoir proposed; and,

"WHEREAS, the loss of 282 residences, as well as the other improvements described above, would reduce the value of assessable property within the two towns by [fol. 4744] approximately $2,700,000.00; and,

"WHEREAS, the tremendous impact of this suggested alternative reservoir on the Towns of Lewiston and Niagara necessitates the opposition of this Board to its use; and,

"WHEREAS, the original proposed development utilizing a portion of the Tuscarora Indian Reservation would be far less damaging to the County of Niagara.

"NOW, THERFORE, be it

"RESOLVED that the County of Niagara represent to the Federal Power Commission and urge the said Commission that it take no action which might result in the further taking of taxable lands within the Towns of Lewiston and Niagara for the purposes of the Niagara River Power Project; and be it further

"RESOLVED that to permit an alternative to be chosen which will cost a minimum of $15,000,000.00 and a maximum estimated at many times that amount, thereby adding substantially to the cost of power, perhaps, indeed, sufficient to jeopardize the industrial growth of the whole Niagara Frontier, seems unthinkable, unless every reasonable effort toward amicable adjustment of the issues between the Tuscarora Indians and the Power Authority has been tried and exhausted."

And it is dated Lockport, New York, November 20, 1958.

Q. That resolution was adopted on the basis of what we were then informed was the alternate reservoir site?

A. That is right, without the taking that we discovered [fol. 4745] when we got here, that is, Colonial Village.

Q. So that instead of 282 houses, it would be 439 plus the other buildings?

A. That is right.

Q. And instead of $2,700,000, it would be nearly twice that amount?

A. That is right.

Q. What was the vote on that resolution, Mr. Powell?

A. There were 40 supervisors present, and it was 39 for and 1 against.

Q. Now you have testified to the affects and disruptions on Lewiston of this alternate site. Are those disruptions, in your opinion, greater in extent, Mr. Powell, than the ones which lead the Town of Lewiston to oppose the original Power Authority plan last year?

A. Much greater.

* * * * * * *

[fol. 4751] Cross examination.

By Mr. Rosenman:

[fol. 4753] Q. You were present during part of the testimony last year, were you not, about the community disruption?

A. I was.

Q. Which would be occasioned by the project which the Authority was then contemplating, is that right?

A. That is right.

Q. Showing you Exhibit 202, you remember, don't you, that the project which was then under discussion was to run [fol. 4754] an open canal from a point immediately north of Lockport Road up to the forebay of the Tuscarora Power Plant.

A. That is right.

Q. Do you recall that?

A. I do.

Q. That is indicated on 202 by this narrow strip of green. Do you recall that?

A. Yes, I recall that.

Q. The Federal Power Commission ruled against the Authority with respect to that, did it not?

A. It did.

Q. And that was on the ground that the canal would cut the town in two and would promote too much community disruption.

A. That is right.

Q. Do you recall that the Authority at the time this canal was under discussion contemplated a bridge across the canal at Witmer Road?

A. Yes.

Q. And do you recall that the Authority also suggested that at any time that another highway was proposed to cross this open canal, that the Authority would construct a bridge over that?

A. I remember that.

Q. Do you recall that?

A. I do.

[fol. 4755] Q. And in spite of that, the Power Commission made the Authority cover that canal in the sense of substituting covered conduits for an open canal.

A. That is right.

Q. Can you tell us the comparative disruption between this narrow body of water constituting the canal over which a bridge was to be built immediately on Whitmore Avenue and over which as a condition of the license it was suggested that a bridge be built to carry any other highway over the canal, how that disruption of the community compares with this alternate site of a reservoir consisting of 1731 acres of water?

A. The reservoir would have been much less disruption.

Q. Which would cause less disruption?

A. Not the reservoir, I mean the conduit, than the open canal would have caused, that is right.

Q. Will you explain why that is?

A. I think that you have—that the Authority had promised to build bridges where roads were necessary and there is no bridge that can be built here.

Q. You know it is impossible?

A. That is right.

Q. To build a bridge over that large reservoir?

A. That is right.

Q. So that the disruption which impelled the Commission to make us cover that—

[fol. 4756] A. It would have been less, that is right.

Q. It would have been less than under the proposed alternate scheme?

A. That is right.

Q. It would have been possible, would it not, and wasn't it suggested by the Authority, that any water system or any sewage system could get by this open canal by underpassing the canal? Do you recall that?

A. I do, that is right.

Q. And as you have testified, that would be impossible with respect to the reservoir?

A. That is right.

Mr. Rosenman: Thank you. That is all.

Presiding Examiner: Mr. Hobbs?

Cross examination.

By Mr. Hobbs:

Q. Mr. Powell, do you recall any other reasons or do you have any other reasons other than sewer and water and community disruption with respect to growth of community which would cause the reservoir to create a greater hazard than the canal which you just referred to?

A. I think we would have to put in transportation if the Saunders Settlement Road were taken out.

Q. And how would that transportation be handled?

A. Well, we have only got Lockport Road on one side [fol. 4757] and Upper Mountain Road on the other to carry that traffic, because there is a lot of traffic on that road.

Q. And how would that be handled?

A. I do not know. That would of course be up to the engineers. I do not know how that would be handled if you took Saunders Settlement Road out.

Q. Are you familiar with, or do you have any civil defense program in the town of Lewiston?

A. Well, not too much, no. The County has, but I know very little about it.

Q. And can you tell me what the situation is with respect to population between the river and the proposed reservoir shown on Exhibit 165?

A. The population right where you had your finger?

Q. In the area on each side of the—

A. There isn't too much. The population is not too great there because that land originally belonged to Niagara Mohawk, I believe, if I understand the map right.

Those are open fields, I believe. There is, of course, the Stauffer Plant and residences along Lewiston Road.

Q. Are there any factories in this area through here?

A. Yes, there is Stauffer Chemical, of course. No, Stauffer Chemical would be on this side.

Q. What other factories are located in that area?

A. The only other factory we have in Lewiston, up in that [fol. 4758] area, is International Cooperage, which is a small plant.

Q. So there is no dense population in this area, either during the day or by reason of housing?

A. No, not dense population.

Q. Will you describe it?

A. There are over along the river, on Lewiston Road, there are residents, but between Military and Lewiston Road, there are very few residents.

I couldn't tell you how many.

Q. And where is Niagara University with respect to this?

A. It would be right on this side of your heavy green line, I would say.

Q. And do they have houses?

A. There it is.

Q. And that is about midway of the reservoir area, is that correct?

A. That is right.

Q. And do they have housing around Niagara University?

A. Yes, there might be fraternity houses or dormitories around there. Most of the boys stay there, I believe.

Q. And what is this area in here, the area in pink, the first turn there?

A. This is the west side.

Q. On the west side of the reservoir?

A. Right in here there are subdivisions on either side of [fol. 4759] the Saunders Settlement Road.

No, I am wrong.

Q. I have reference to the area outside of the pink area.

A. No, this is where the Power Company, the Power Authority has acquired this land right in here between Witmer Road and that is all Power Company right in through there.

Q. How about this area through here, what is this?

A. That is the town of Niagara.

Q. The town of Niagara?

A. Yes.

Q. The testimony you gave was respect to the town of Lewiston?

A. That is right.

Q. So there is quite a population area in the town of Niagara?

A. Yes, very much so.

Q. I believe you stated your objection to the alternate reservoir shown in Exhibit 165 was greater than your objection to the open conduits?

A. That is right.

Q. By that I have reference to the green strip along the conduits shown on Exhibit 202. Will you explain why your objection is greater?

A. Well, because the Power Authority promised to build the bridge on Witmer Road and any road that was neces- [fol. 4760] sary running east and west they would bridge it. If the land was taken that is on 202, that is now in pink, it would close an entire road, remove a lot of taxable valuation or land from the tax rolls and would destroy a lot of houses that are now used for residences. Not only that, but you could include the schoolhouse that was mentioned in the testimony and the firehall that was mentioned in the testimony.

They would all be taken out of the town.

Q. Is the school to be taken which is covered by the pink area on Exhibit 165, is that school located in the town of Lewiston?

A. Yes, on the Saunders Settlement Road on the corner of Military Road.

Q. And what provision would have to be made if that school is taken?

A. I wouldn't know.

Q. You referred to an 8 to 10 inch water line. Can you tell me where that water line is on Exhibit 202?

A. Not all of it, but I know where part of it is. That part that is in the town of Lewiston runs right along here and we tap on in the town of Niagara, the contractors tap on in the town of Niagara and carry it to the town of Lewiston and out to Saunders Settlement.

Q. So you tap on—

A. This is the west side.

[fol. 4761] Q. You tap on to the west side of the reservoir?

A. That is right.

Q. Along about the Niagara-Lewiston line, just inside the Niagara line along Military Road, is that correct?

A. The junction of Military and Saunders Settlement. Saunders Settlement goes this way and then they call this Witmer Road. It is the same road, but it is confusing.

Q. And then the line goes east?

A. That is right.

Q. Along—

A. Out to Klein Road and I think Klein Road is right there.

Q. It goes out to the east side of the reservoir?

A. That is right.

Q. And how much of that line is completed?

A. None of it. I haven't seen the digging, but I have seen all the pipe. The contractor had the pipe all laid out last week and I have been here since Monday so I do not know what they have done.

Q. You do not know how much of it is completed yet?

A. No, I do not, but the materials were all there.

Q. I believe you testified that the town of Lewiston provided fire protection to the Tuscarora Indian reservation?

A. That is right.

Q. And that no contribution by way of taxes—

[fol. 4762] A. That is right.

Q. —is provided by the Indian reservation?

A. That is right.

Q. Is any other contribution provided by the Indian reservation for the fire protection?

A. No.

. . . . . .

[fol. 4775] Redirect examination.

By Mr. Chace:

Q. Mr. Powell, among the other reasons that you object to this alternate reservoir site, in addition to those you stated on cross-examination, was there the loss of assessment to the town of Lewiston?

A. That is right.

Q. And is that about 9 per cent of the total assessment roll which would be involved in this additional taking?

A. That is right. I stated it prior to that.

Mr. Chace: That is all.

. . . . . .

[fol. 4777] JOHN J. HILL was recalled as a witness and having been previously duly sworn, was examined and testified further as follows:

Further direct examination.

By Mr. Rosenman:

[fol. 4787] Recross examination.

By Mr. Hobbs:

Q. Chief, how much land do you own on the reservation?
A. 15 acres, more or less.
Q. How much do you own within the proposed reservoir area?
A. Not a bit.
Q. Is your land farmed?
A. Yes, it is.
Q. Who is it farmed by?
A. It is farmed by Ervin Hasley.

[fol. 4791] Further recross examination.

By Mr. Lazarus:

[fol. 4792] Q. —with respect to the leasing of land on the reservation to non-members of the tribe. Do you know why the members of the Tuscarora Nation who do have assignments lease out the land to non-members of the tribe?
Let's start with your mother.
A. Yes, I do. It is land that she has accumulated naturally from my dad and no doubt from the generation before and it has been her desire as they could to buy land from someone else, from the next Indian, and increase their property owning, and as I say, it has been to my knowledge that our reservation has been set not as a farming land, but strictly as a place for us to live and to do and to be as we please, and if I am not mistaken, it is right in our

treaties that that land is to be used as we please. If we desire to keep it and let it grow up in weeds and bushes and use it for hunting purposes only, that is our desire and the purpose of it.

Q. In other words, when a member of the nation leases out land to a non-member of the nation, that just represents the choice of that individual as to what he happens to want [fol. 4793] to do with the piece of land that he happens to have use rights in?

A. That is right.

* * * * * * *

[fol. 4794] GEORGE R. RICH was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Will you give your full name and address to the stenographer?

A. My name is George R. Rich, and I live at 90 Maple Street, Malden, Massachusetts.

Q. Are you the Rich of Uhl, Hall & Rich?

A. Yes, sir.

Q. And what is your occupation, what is your profession?

A. I am a civil engineer.

Q. And do you specialize in any kind of engineering?

A. Yes, hydraulic engineering.

Q. You testified at the hearings last year, didn't you?

A. Yes, sir.

Q. And you gave a full list of your qualifications there, did you not?

A. Yes, sir.

Q. Will you state briefly for the record what the purpose of the Tuscarora—withdrawn. Will you state for the record [fol. 4795] briefly what the purpose of this reservoir is at the site we have been talking about?

A. Well, the amount of water that is available to the development is stipulated by the provisions of the 1950 treaty between the United States and Canada. During the tourist

season the treaty requires that 100,000 second feet of flow be required for passage over the Falls. At other times the flow required is 50,000 second feet. Now the electrical load is a maximum during the daytime and the water-supply by the provisions of the treaty, the maximum water supply, available occurs during the nighttime. So that to secure economical operation of the plant it is necessary to store flow, excess of flow, not required at night for application to the load curve during the daytime.

Q. So that—

Mr. Lazarus: Your Honor, I move that the answer be stricken and that any testimony by this witness with respect to the purpose for which the reservoir is to be created also be held to be irrelevant. The 4(e) finding deals with the purpose for which the reservation was created. That is the Indian reservation, not the reservoir. So I move that the answer be stricken and that all testimony by this witness with respect to the purpose of the reservoir be stricken.

Presiding Examiner: Objection overruled.

Mr. Lazarus: Continuing objection, Your Honor.

[fol. 4796] Presiding Examiner: It will be so noted.

By Mr. Rosenman:

Q. In other words, you take water which you are permitted to do, from the river which you can not use and store it until such time as you can use it, is that correct?

A. Exactly, yes, sir.

Q. And is it the intention of the design of this reservoir and the rest of the project to use the maximum amount of water which the United States is allowed under this treaty?

A. That is the intention, yes, sir.

Q. And in order to do that, how large must the reservoir be?

A. Sixty thousand acre-feet effective capacity.

Q. If the reservoir is less than 60,000 acre-feet, there is not a maximum use of the water which the treaty gives the United States, is that correct?

A. That is correct.

Q. At 60,000 acre-feet, and using all of the water which

the United States is permitted to use under the treaty, what is the firm capacity of the project?

A. 1,800,000 kilowatts.

Q. And if the reservoir is reduced in size, does the number of firm capacity of kilowatts decrease?

A. It does, yes, sir.

[fol. 4797] Q. And does it decrease in some proportion with respect to the decreased acre-feet of the reservoir?

A. It is roughly in linear uniform proportion with some corrections to the upper portion of the curve which I will explain in detail later if you wish.

Q. What do you mean by "firm capacity", Mr. Rich?

A. Firm capacity represents the amount of steam capacity for the system that we are not required to construct by virtue of the construction of this development. And it also implies capacity that can be utilized when needed by the system load curve. In other words, we have to consider a particular system load curve to define dependable capacity.

Q. Does the reservoir as planned in the present proposal contain 60,000 acre-feet?

A. In our present proposal it contains 60,000 acre-feet.

Q. And do you know whether or not in the alternate proposal there is the same number of feet?

A. Yes, there is the same number of feet.

Q. And is there the same number of acre-feet in all of the exhibits, 161 through 165, which have been marked in evidence?

A. Yes, there is.

Q. This alternate reservoir that is shown on Exhibit 202 would have the same number of acre-feet, would it not?

A. It would.

Mr. Lazarus: Objection to any testimony about alternate [fol. 4798] reservoirs, Your Honor, on the same basis as I have made the objection before.

Presiding Examiner: I permitted you a continuing objection to his testimony.

Mr. Lazarus: I just want to be sure. The last one was to the purpose for which the reservoir was created. I wanted to be sure I had the objection on the subject of the—

By Mr. Rosenman:

Q. Could you tell us what the firm capacity of this project would be if we had no reservoir at all?

A. It would be approximately 1,100,000 kilowatts.

Q. As compared to 1,800,000 with the reservoir of 600,000 acre-feet?

A. That is correct.

Q. Sixty thousand acre-feet.

Have you made some estimates of the firm capacity of this project if we used as a reservoir the present proposed reservoir without the land which is proposed to be taken from the Tuscaroras? In other words, this large green patch on Exhibit 202, have you made some computations as to what would happen if we used that as the reservoir and none of the Indian land?

A. Yes, sir, we have.

fol. 4799 Q. What is your estimate of the number of acre feet that would be included in the reservoir as presently proposed without taking any Indian land?

A. 30,000 acre feet.

Q. 30,000 acre feet. Have you made some estimates as to what the firm capacity of the project would be with a reservoir of 30,000 acre feet?

A. Yes, sir, we have.

Q. What is that figure?

A. 1,500,000 kilowatts.

Q. That would be a reduction of 300,000 kilowatts in the firm capacity of the project, is that correct?

A. Yes, sir.

Q. Would this have any effect upon the cost of power to those who buy power from the Authority?

A. Yes, sir.

Q. Have you estimated what this would mean in increased cost of the power per kilowatt hour?

A. We have, sir.

Q. Will you state what it is?

A. It would increase the cost of power from 4½ mills per kilowatt hour to about 4⅝ mills per kilowatt hour.

Q. That would be an increase of a half mill, is that correct?

A. Yes, that is correct.

[fol. 4800] Q. You were present, were you not, and gave testimony during the Commission hearings last year?

A. Yes, sir.

Q. And are you familiar with the size of the reservoir which the present license which the Power Authority has received from the Federal Power Commission states?

A. Yes, sir.

Q. What is that capacity?

A. It prescribes 60,000 acre feet.

Q. And is it your understanding, after extensive hearings, that the Federal Power Commission arrived at that in order to carry out the mandate of Congress as—

Mr. Lazarus: Objection, Your Honor, I do not see how this witness is at all competent to testify about what the Commission did with respect to a mandate from Congress. He is not qualified to answer that question at all.

Mr. Rosenman: Withdrawn.

By Mr. Rosenman:

Q. Was there testimony during the hearing that 60,000 acre feet is necessary in order to carry out the mandate of Congress as set forth in the statute?

A. Yes, sir.

Q. And that is the only way we can make maximum use of the water—

Mr. Lazarus: I object to this, Your Honor. What [fol. 4801] transpired at the hearings is a matter of public record. I move that the previous answer be stricken and that this line of questioning be stopped. We have the hearings of the Commission available in this proceeding, we need not quiz this witness about them.

Presiding Examiner: The Act of 1957 provides that the Federal Power Commission is directed to issue a license for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by the international agreement. Mr. Rich, apparently, is a qualified hydraulic civil engineer, and there have been no objections to his qualifications, so he will be permitted to answer and the objection is overruled.

Mr. Lazarus: Your Honor, again not to argue with the ruling of the Chair, if the question directed to the witness is whether 60,000 acre feet is necessary to utilize the entire share, in his expert opinion, then of course I have objected to it on the grounds of relevancy. But I suppose the witness is qualified to answer it if that objection is overruled. However, I do not think the witness is qualified to tell us what occurred at hearings once before because we have the record of those hearings and nothing he can say here today is going to change that. Now I believe the question was directed to what occurred at those hearings, and therefore [fol. 4802] it is objectionable. If he is going to testify to his present opinion, then object to the objection on relevancy I imagine he can testify.

Presiding Examiner: Will you phrase your questions in that way, Judge?

By Mr. Rosenman:

Q. Is it your present testimony that in order to use the full United States share of the water, that it is necessary to have a reservoir of 60,000 acre feet?

A. Yes, sir.

Q. Were you present at the hearings before the subcommittee of the Committee on Public Works of the United States Senate in April of 1957 when Mr. Moses testified?

* * * * * * *

[fol. 4806] Mr. Rosenman: I am reading from a document which I have described, and which was marked Item 4 in the prior proceedings, in the prior testimony in this proceeding.

Mr. Landy: Mr. Rosenman, did you identify this as Public Document 4?

Mr. Rosenman: It is called Item 4. That is what the prior examiner designated it as. And it is the hearings before the subcommittee of the Committee on Public Works of the Senate, Eighty-Fifth Congress, First Session, dated [fol. 4807] April 10, 11, 12, 13, 1957.

Presiding Examiner: Judge, is this the official transcript, the printed transcript of the hearings?

Mr. Rosenman: Yes, sir. Labeled "Development of Power at Niagara Falls, New York."

I will read two or three sentences of Mr. Moses' testimony:

"This is important because we plan to build at Niagara a project capable of using all of the flow of the river available to the United States. Obviously, if the first 20,000 of the 50,000 cubic feet available in an average year were taken away, it would be an entirely different project. Obviously also, in lean years when the flow goes below 200,000 cubic feet, the effect on the project would be even greater."

Then on the same page, page 71:

"We will build a project with a total installed capacity of 2,190,000 kilowatts. Of this, 1,800,000 will constitute firm power on a 17-hour-day basis. We are able to achieve this amount of firm capacity by building a storage reservoir into which we will pump at night water which we are allowed to divert at night but which is required to go over the Falls in the daytime. The pumps which drive the water uphill into the reservoir at night will be turned into generators which will produce power when the water is allowed [fol. 4808] to run downhill through them in the daytime. By tying the St. Lawrence and Niagara projects together we expect to increase the total firm capacity of the two projects by 200,000 kilowatts. If we count all of this as Niagara power, the project will have a firm 17-hour capacity of 2 million kilowatts."

By Mr. Rosenman:

Q. Were these figures and computations provided by Uhl, Hall & Rich to Mr. Moses?

A. Yes, sir, they were.

Q. And is it possible to produce 1,800,000 firm capacity without using 60,000 acre-feet of reservoir?

A. No, sir, it is not.

Q. Is it possible to produce a total installed capacity of 2,190,000 kilowatts without a reservoir that size?

A. That does not depend on the reservoir, sir, that is simply the total machine installation.

Q. But the firm capacity on a 17-hour basis is possible only with a 60,000 acre-foot reservoir?

A. That is correct.

Q. And if you tie the St. Lawrence and the Niagara projects together, with a smaller reservoir than 60,000 acres, will you be able to produce a combined 17-hour capacity of 2 million kilowatts?

A. With a smaller reservoir, no, sir.

* * * * * * *

[fol. 4809] Cross examination.

By Mr. Lazarus:

* * * * * * *

[fol. 4810] Q. And you have on the exhibit there a reservoir, not including any Tuscarora land, but which does include 60,000 acre-feet.

Now the question I am asking you is whether you can get 1,800,000 kilowatt capacity out of that reservoir?

A. To answer your question positively I would have to have a definitive statement of the agreement of what this land is going to be like. For instance, I may—I do not want to digress, but I do not see how I can help it. The litigation on this may be interminable. When we finally get a reservoir, it may represent a compromise.

[fol. 4811] Q. I am not asking you about a compromise, I am asking you about the reservoir there which you have described as containing 60,000 acre feet. And I am saying, assuming we get that reservoir, will we be able to produce 1,800,000 kilowatt capacity?

A. Assuming that we get that reservoir, without any abatement, reservation, or exception as is shown there, we will be able to get 60,000 acre feet and produce 1,800,000 kilowatts.

Q. I see. And if you had a reservoir which did not have those boundaries, but did have 60,000 acre feet, and did not include land within the Tuscarora Reservation, we would still be able to get 1,800,000 kilowatt capacity?

A. Yes, sir.

* * * * * * *

[fol. 4817] Cross examination.

By Mr. Hobbs:

* * * * * * *

[fol. 4818] Q. Now, assuming you maintained a reservoir of 60,000 acre-feet, but doubled the height of your reservoir, would the net output of the project be considerably reduced?

A. Well, the question is hypothetical. We cannot do it. [fol. 4819] The machines will not do it. They are purchased, and they won't—

Q. I am talking about assuming starting from scratch?

A. I would not do it then. It would not be economical, as we demonstrated in our first hearing.

Q. I am talking about your net output, would that be decreased?

A. I do not see that it would.

Q. Why wouldn't it be? Why would it be uneconomical if your net output is not decreased?

A. If we decreased the area of the reservoir and raised the height of the dikes, the dikes are going to cost more, the machines to pump the water through the additional head will have to be more powerful so we will pay more money for turbines, for generators and for structures. In addition to that, the cost of power for pumping will be greater.

Now, when we take the aggregate cost of these debits and credits for a somewhat reduced amount of land, we would find that the proposal would be definitely uneconomical, as we demonstrated in our first hearing.

* * * * * * *

[fol. 4842] Norman J. Schreiber was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. What is your name, sir?

A. Norman J. Schreiber.

Q. Where do you live?
A. 1211 Ferry Avenue, Niagara Falls, New York.
Q. What is your job?
A. Director of the Niagara County Welfare Department.

[fol. 4843] Q. But in any event, Mr. Schreiber, I show you Exhibit 211, which is a document prepared today, as I have said, by a previous witness, Chief Hill, in collaboration with some other chiefs. And it contains a list of the names of people living, according to the committee, in the part of the Tuscarora Reservation which is needed for power purposes. And I ask you whether or not you could tell us how many—not names, but how many—of the people on the list, either are presently on the relief rolls or have been in a recent period in the past, and tell us what that period is.

A. I have read these names. I think there is one, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, -1, -2, -3, -4, -5, -6, -7, -8, submitted by Mr. Hill and checked with our office and records. And out of that 37, one, two, three, four, five, six, seven, eight, nine, 10, 11 names have appeared on the welfare rolls since 1950.

Q. All right. Now I show you a document submitted in this proceeding by Mr. Stanley Grossman, which constitutes a petition to intervene by some clients of Mr. Grossman who are owners or alleged owners of part of the Tuscarora [fol. 4844] Reservation which is needed for power purposes. Have you looked at that document?

A. I have, sir.

Mr. Grossman: Your Honor, before this witness answers this next question of Mr. Moore, it would seem to me that any identification of the people whose names appear in that petition, and their appearance on the welfare list, would in fact be contrary to the policy of the Welfare Department because, obviously, there is such a limited number of people.

The Witness: Could I explain that to Your Honor?

In Niagara County we have no secrecy in the welfare list. It is only because of this hearing here. Any responsible

citizen can come in at any time and find out who is on welfare, how much they get, and what you have. But I haven't given any names in this proceeding here today.

Presiding Examiner: I understand all he has asked for here is to look at that list of the names and see how many—

The Witness: I have to have the names to check it.

Presiding Examiner: —how many, if any of them, are, or have been, on the welfare rolls. It does not designate any particular individual.

Mr. Moore: That is right, Your Honor.

Presiding Examiner: You contemplated doing the same as you did with the other list?

Mr. Moore: That is right. I asked him to look at it.

fol. 4845 By Mr. Moore:

Q. You have looked at it?

A. Yes, sir.

Q. Will you tell us how many of the people whose names appear there—

A. Well, the names that appear here—

Q. —are either now, or presently, on some form of relief, or have been during the period since 1950?

A. There are quite a few names on this list. I did not count them but—

Q. Excuse me, I am sorry, may I withdraw the question, sir. I am talking now about people on Mr. Grossman's document who do not appear on Exhibit No. 211.

A. There are seven such names.

Q. That is, there are some people on Mr. Grossman's list which are also on Exhibit 211?

A. That is right.

Q. You are not counting them?

A. That is right, not counting them.

Q. But in addition to the people about whom you testified on Exhibit 211, there are seven, you say?

A. That is right.

Q. Seven of Mr. Grossman's clients who have received relief during what period?

A. They ranged—some of those on his list go back to fol. 4846 '44, the year 1944. Some of them in '58. I can

give them to you now roughly, '44, '52, '58, '58, '56, '54, '58, '53, '55 and '48.

Q. Well, you mean that the persons who received relief in '44 have not received it since '44?

A. Not '44, that is right. I gave the last date all through here.

Mr. Moore: Fine. That is all.

Cross examination.

By Mr. Lazarus:

Q. When you said that 11 of those on Chief Hill's list had been on the list since 1956, does that mean that 11 are on now?

A. No. No, sir.

Q. I see.

A. Right at the present time that list - two of them are on right now.

Q. Only two out of 38 are on now?

A. Some were in '56, some '57, '54.

Q. The next question is, if those individuals who have received, or are receiving, relief were moved to another part of the Tuscarora Reservation, would their status otherwise change in so far as relief is concerned?

A. It would not change wherever they moved to Niagara County.

fol. 4847] Mr. Lazarus: No more questions.

fol. 4852] William S. Chapin was called as a witness and, after being first duly sworn, was examined and testified as follows:

Mr. Lazarus: Mr. Examiner, first, as a preliminary matter, may I read this letter into the record now?

Mr. Rosenman: Which is that?

Mr. Lazarus: Mr. Moore looked at it this morning. It is the letter I referred to in the examination of Chief Hill yesterday.

Mr. Rosenman: Oh, yes.

Mr. Lazarus: With your permission, Mr. Examiner, I would like to read this letter into the record since we have only one copy.

Presiding Examiner: Proceed.

Mr. Lazarus: This is a letter on the letterhead of the United States Department of Interior, Bureau of Indian Affairs, Washington 25, D. C. It is addressed to Mr. John Hill, Sandborn, New York, with a carbon copy to Mr. Elton Greene, President, Tuscarora Indian Nation, Sanborn, New York. The letter is dated July 22, 1954.

"Dear Mr. Hill:

"This is to advise you that the M. Stein Company of New York City has informed this office that it expects to begin [fol. 4853] shipping the cloth for fulfilling a treaty with the Six Nations of New York for the year 1954 the latter part of this week. The 1,250 yards for the Tuscarora tribe of Indians are to be consigned to Sanborn in your care. Kindly be on the lookout for this shipment.

"When you have received the goods please immediately . . . "—and immediately is underlined—"acknowledge receipt of it on one of the copies of the purchase order inclosed herewith and return that copy to this office. The other copy may be kept for your records.

"We inclose a self-addressed envelope which requires no postage for return of the receipted copy of the purchase order.

"For your convenience, an acknowledgement has been typed on the face of one of the purchase order copies which, if you fill in the date, number of yards and sign, will be acceptable as an acknowledgement.

"Your prompt acknowledgement will be much appreciated.

"Sincerely yours,"

signed by Hugh F. Alexander, Acting Chief, Branch of Property and Supply.

[fol. 4859] Direct examination.

By Mr. Rosenman:

Q. Mr. Chapin, have you given the stenographer your full name and address?

A. I have given my name. My address is 30 West 60 Street, New York City, New York.

Q. What is your position with the power authority?

A. General Manager of the Power Authority of the State of New York.

Q. And are you in general supervision, subject to the Board of Trustees, of the operations of the authority?

A. That is right.

Q. And you have been for how long?

A. I have been general manager since March of 1954.

Q. You were general manager during the construction of the St. Lawrence Project and up to now in the construc-
[fol. 4860] tion of the Niagara Project; is that right?

A. That is right.

Q. Do you recall the hearings last year on the application for a license, and do you recall testifying in those hearings?

Mr. Lazarus: Objection, Your Honor. We are now getting onto legislative history again.

Presiding Examiner: I cannot tell yet what he is getting to.

Mr. Lazarus: All right. I will let this one be answered. I know and you know what the next question is going to be.

The Witness: I do.

By Mr. Rosenman:

Q. Do you recall the testimony in that regard with respect to community disruption?

A. I do.

[fol. 4861] Q. Do you recall the testimony, also, of representatives of the town of Lewiston with respect to community disruption?

A. I do.

Mr. Lazarus: A continuing objection?

Presiding Examiner: It will be so noted.

By Mr. Rosenman:

Q. Showing you Exhibit 202, can you state what the original plan, which was the subject of discussion at the last hearing, during the previous hearings, consisted of with respect to this portion of the exhibit, indicating the reservoir and power plant?

. . . . . .

[fol. 4862] The Witness: The plan in that area provided for, the plan submitted by the authority, provided for an open canal running from the city line, the line between the city of Niagara and the town of Niagara, north to the forebay of the Tuscarora Powerplant, and for a surge basin in form of a canal between the Tuscarora Powerplant and the Lewistown Powerplant, as shown in green on the exhibit in front of me.

By Mr. Rosenman:

Q. The open canal was that part running from north of Lockport Avenue at the city line, northward to the forebay; is that correct?

A. That is right.

Q. Do you recall what the power authority agreed to do with respect to transversing that canal, if necessary?

A. The power authority agreed to build a bridge at Witmer Road—

Q. Is that indicated in red over the green line on 202?

A. That is right.

(Continuing) —and in addition the power authority agreed that it would build any other bridges between the city line and the Tuscarora Powerplant, which might be desired by the local authority and which would connect with roads within the community.

[fol. 4863] Q. And this was to meet the opposition of the town of Lewiston, was it not, to their claim that this open canal cut their town in two?

A. This was to meet the opposition of the town of Niagara and the town of Lewiston.

Q. That that was the effect of the canal?

A. That is right.

Q. You are familiar with the license, of course, which was finally granted by the Commission?

A. I am.

Q. And what did that direct the power authority to do with respect to that open canal?

A. The license directed the power authority to build a covered canal, or to extend the covered canal, which runs all the way from the intake at the Niagara River, to extend that northerly through the town of Niagara and through the town of Lewiston to the forebay of the Tuscarora Powerplant.

Q. So that according to the license and according to the plans of the authority, now, there will be covered conduits running from the intake at the Niagara River all the way to the forebay of the Tuscarora Powerplant; is that correct?

A. That is right. That work is all under contract.

Q. You gave testimony on this subject of community disruption, did you not?

A. I did.

[fol. 4864] Q. Will you compare the community disruption which would be occasioned, which would have been occasioned by that open canal transversed by one bridge at Witmer Road, and the other bridges to which you testified, as compared with the community disruption caused by the suggested alternate reservoir on 202?

A. There is no question but what the community disruption which would be caused by the alternate reservoir scheme would be far more serious than the situation—many times more serious—than the situation which would have existed across the open canal.

The distance between the Tuscarora Powerhouse and the New York Central Railroad—which, incidentally, is a fixture—is about half the distance from the northerly limits of the reservoir as shown on this exhibit, and the southerly limits of the alternate scheme, which is also limited by the New York Central Railroad.

Q. Will you explain why it is limited by the New York Central Railroad?

A. This particular railroad is the main-line railroad from Canada to the United States. This railroad is the most essential feature, probably, in the grade-crossing program in the city of Niagara Falls which has just gotten underway.

Along this railroad will be located the yards of the New York Central and the Erie Railroads, the new passenger [fol. 4865] stations, which will be removed from the center of Niagara Falls, and the other facilities which are now running directly through the city of Niagara Falls.

Q. Turning to another subject, Mr. Chapin, have you had any experience in moving houses and utilities, roads, and railroads, which are in the path of the construction of an important project?

A. I have.

Q. What experience has that been?

A. Well, we have just completed the moving of a very substantial number of roads, houses, and utilities at the St. Lawrence Project, which started generation in July. On this particular project, we have successfully virtually cleared the right of way, having moved roughly 80 houses from what is known as the "alphabetical" streets in Niagara Falls.

Q. That is down at the intake, is it not?

A. That is down in the vicinity—it is between Buffalo Avenue, north of Buffalo Avenue in that area. And we have relocated transmission lines; we have built detours for highways and for railroads; and have taken care of the utilities. And, as a result, the excavation throughout the entire length of the covered conduits is now underway.

Q. Have you supervised similar work on the St. Lawrence Project?

A. I have.

[fol. 4866] Q. And what about your experience before you began the St. Lawrence Project?

A. Well, over the past 20 years in the city of Niagara Falls—in the city of New York, we have constructed the greatest mileage of express, urban express arteries in any place in the world, and we have probably had greater problems in relocation of houses, utilities, and highways than any other place in the world. And I had a very—up until I went with the power authority—I had a very active part in that program.

Q. Could you tell us, based on that experience, how long you would think it would take for the authority to move some 445 houses, 2 cemeteries, and other facilities contained in this alternate reservoir after acquiring the land?

A. After title has been cleared and all litigation disposed of, I would say it would take a minimum of two years to carry out a program of that nature. We would always have the problem of acquiring new land in order to relocate these homes, and that in itself would involve a considerable amount of time.

Q. But the period of time after you acquired the land would be how much, did you say?

A. About two years.

Q. Colonel Chapin, will you tell us how far the power authority has proceeded up to date on the Niagara Project?

A. Well, we have let contracts for the Lewiston Power-
[fol. 4867] house, the Tuscarora Powerhouse, the surge basin between the two powerhouses, the covered conduits between the Tuscarora Powerhouse and the Niagara River, the intake at the Niagara River, including the intake t the river. We have also relocated many highways; we have built detours for highways, railroads and other utilities. In addition, we have let a number of construction contracts, provided temporary bridges in order to avoid interference with the hauling of our materials, interference with local traffic from the haul of materials. We have purchased the turbines and the generators for the Lewiston Powerhouse, and they are now being manufactured. We have purchased the pump turbines and the motor generators for the Tuscarora Powerhouse. They are being manufactured. We have purchased transformers, governors, and, as a matter of fact, including the land acquisition, have commitments of upwards of $450 million.

[fol. 4868] Q. That covers both land acquisition contracts already entered into for construction and equipment?

A. That is right.

Q. Can you tell us how much money the Power Authority has borrowed to date for these purposes?

A. We have borrowed $100 million from the commercial banks.

Q. When was that loan negotiated?

A. That loan was negotiated the first of February of this year.

Q. And it is to be repaid when?

A. It must be repaid on the first of February 1959.

Q. Now have you made an estimate of when the Authority will run out of money for construction purposes and other purposes?

A. Yes, I have. Our commitments are such that between the first of January and the 15th of January this $100 million fund will be exhausted.

Q. And unless you are able to borrow more money, then, what would be the effect?

A. If we could not borrow more money by that time, why we would have to cancel contracts, or we would be in breach of contract.

Q. About how many millions of dollars?

A. Around $400 million.

[fol. 4869] Q. That would mean that work would be suspended to that extent on the project, if you could not borrow money in January?

A. Work would have to stop if we could not pay for it.

Q. Now will you state in general terms what the result of work stoppage would be?

A. That would be catastrophic. I do not think there has ever been a project of this magnitude which has been brought to a sudden halt with—

Mr. Lazarus: Does my objection run also to testimony about the results of performing illegal acts?

Presiding Examiner: The objection runs to all of his testimony.

Mr. Lazarus: All of this witness' testimony.

By Mr. Rosenman:

Q. Proceed.

A. The problem of cancelling contracts, cancelling subcontracts, and I believe we have about 160 contracts and subcontracts, and of cancelling equipment under manufacture, with the effect upon the material suppliers all the way down the line, running in plants across the country, would be something to contemplate.

Q. And you spoke about the possible litigation which would result, did you not?

A. The litigation would probably—the litigation is some-
[fol. 4870] thing that would probably run for year.

Q. Now have you made any study, or has your staff made any study, to determine whether it is possible for the Authority to borrow money in order to prevent this kind of catastrophe as you call it?

A. Yes, we have been busily engaged in trying to find a way to prevent this type of thing from happening.

Q. And what has been the result of your study?

A. We have found that it is possible for us to continue the financing of the project by cutting back the project to eliminating the Tuscarora lands.

Q. Using just the green patch on Exhibit 202, without any Indian land, is that correct?

A. That is right.

Q. Mr. Rich testified that would provide a reservoir of 30,000 acre feet instead of 60,000 acre feet?

A. That is right.

Q. Did you hear his testimony yesterday with respect to what that would result in?

A. I did.

Q. In kilowatts and mills per kilowatt hour?

A. I did.

Q. And do you agree with that?

A. I do.

Q. Now does the Authority wish, if possible, to proceed
[fol. 4871] with a 60,000 acre foot reservoir, which was ordered by the Federal Power Commission and which was mandated by the Congress?

A. We do.

Q. If it is possible to obtain a larger 60,000 acre foot reservoir, even after financing on the basis of a smaller reservoir, is it the intention of the Authority to use every means it can to obtain and construct a 60,000 acre foot reservoir?

A. That is right.

Q. And that would require, would it not, the taking of the reservation, that part of the reservation which is presently contemplated?

A. That is true.

Q. And do I understand the intention of the Authority is to proceed to do that if it is at all possible?

A. That is right.

Q. I think I asked you whether you agreed with Mr. Rich's testimony as to the cut in the kilowatt capacity and the price per kilowatt hour, and you said that you agreed with his estimates.

A. Well, I would like to qualify that. As I say, I do agree, but the actual computations have been made by Uhl, Hall & Rich.

Q. The consulting engineers?

A. The consulting engineers, that is right.

[fol. 4872] Q. In your opinion would 4¾ mills per kilowatt hour be the kind of low cost power which Congress contemplated in passing the statute?

Mr. Lazarus: Objection, Your Honor. This witness is not competent to testify as to what was the intention of Congress with regard to the subject matter of the question.

By Mr. Rosenman:

Q. Well, would it be as low cost as if you were able to use all of the water of the Niagara River as provided in the treaty?

A. No, it would not.

Q. And it would not be as low cost as it would if you had this 60,000 acre reservoir?

A. That is right.

Mr. Rosenman: May I have assigned a number to a brochure entitled "As a Result of the Destruction in 1956 of the Schoellkopf power plant . . . the Niagara area is faced with an emergency."

Presiding Examiner: That will be marked Exhibit 218 for identification.

(The document referred to was marked for identification as Exhibit No. 218.)

By Mr. Rosenman:

Q. Exhibit 218 for identification is a letter addressed to the members of the House of Representatives with respect [fol. 4873] to H. R. 8643, 85th Congress, First Session, is it not?

A. That is right.

Q. What is the date of this?

A. The date of this is June 7, 1956—I am sorry.

Mr. Moore: On page 2, the end of the Moses' letter.

The Witness: July 25, 1957.

[fol. 4874] By Mr. Rosenman:

Q. July 25, 1957. That was while Congress was considering the statute under which this license was granted, was it not?

Mr. Lazarus: I object to this line of questioning, Your Honor. If Congress was in session at that time, it is a matter of public record. This witness cannot testify either one way or another as to when Congress was in session.

I object also to this line of questioning which, of course, is getting up to the matter of legislative history. And again, what is a matter of legislative history is what appears in the records of Congress. If this were before Congress, there would be a record of it, a public record of it. If it was not before Congress, there was no public record of it. And this witness' testimony as to what was done with this particular brochure is not competent. Therefore, I move that the line of questioning not be allowed.

Mr. Rosenman: There will be testimony by Mr. Chapin that this was sent to the House of Representatives.

Presiding Examiner: Let me have a copy of it, Judge.

Mr. Lazarus: Your Honor, that type of testimony is not competent either. What was sent to Members of Congress does not make a bit of difference in terms of legislative history. Legislative history is based upon what was officially before Congress. Therefore, I move that the whole line of questioning not be allowed.

[fol. 4875] For one, it is irrelevant for the purposes of this proceeding. And for two, it is incompetent.

Presiding Examiner: Mr. Lazarus, the letter to which they refer on page 2 indicates that it was mailed to Members of the House of Representatives with reference to the pending bill. This court, I think, can take judicial notice of the fact that the second session of the 85th Congress was yet in session during July of 1957. Whether or not the Public Works Committee of the House was in session at that particular time, I cannot say; because they meet infrequently on call of the chairman. I will let you preserve your objection, and we will go along.

By Mr. Rosenman:

Q. I think the question was, at that time Congress was considering the bill which it passed the following month; did it not?

A. That is right.

Q. The bill under which the Commission held hearings and granted a license to the power authority?

A. That is right.

Q. I call your attention—do you have a copy of this?

A. No, I don't have a copy.

Q. I call your attention to the map on page 8 and 9. Will you explain what that map indicates?

A. This map is a comparison between the cost of power at Niagara, which was estimated to be about 4 mills, with [fol. 4876] the cost of steam power in various areas up to 350 mills from Niagara Falls. This map shows that a steam plant at Rochester could produce power—at Rochester on Lake Ontario—could produce for something over 7 mills, and that for plants which were built in the Pennsylvania coal area, steam power could be produced there with modern steel plants for 4¼, 4 or 5 mills in that area.

Q. And this was a statement by you that power could be produced at Niagara for how much?

A. Four mills.

Q. Was that before the Federal Power Commission compelled us to cover the canal?

A. That is right.

Q. So that the 4 mills was based upon the plan which we submitted to the Power Commission; was it not?

A. That is right.

Q. Of an open canal, as you have described it?

A. That is right.

Q. Now I ask you to look at Exhibit 7 of this brochure, the second column, the second full paragraph. Will you state what that indicates?

Mr. Lazarus: I believe the brochure speaks for itself, Your Honor. What it ever indicated to the reader will appear in that paragraph. And this witness cannot tell us any more about what that paragraph indicated to anyone [fol. 4877] else. We are all as competent as the witness to say that.

I object to the question.

Mr. Rosenman: I withdraw the question.

By Mr. Rosenman:

Q. Do you notice that paragraph?

A. I do.

Q. Had you been told by the industries at Niagara what the price of power would have to be to enable them to remain in the area?

A. The industries at Niagara Falls had informed us that unless we could produce power for 4½ mills, that it would not be competitive with other low-cost power and that, therefore, they could not; or that they could not compete with industries from low-cost power in the production of the electrochemical and metallurgical products.

Q. Will you also look at the inside cover of this brochure? Do you notice the representation made as to the size of the reservoir?

A. Yes, we indicated a storage capacity of 60,000 acre feet.

Mr. Rosenman: May I have this sheet of paper entitled, "Release—Niagara Brochure—July 25, 1957" given a number?

Presiding Examiner: It will be marked Exhibit 219 for identification.

[fol. 4878] (The document above referred to was marked for identification as Exhibit No. 219.)

By Mr. Rosenman:

Q. Will you look at Exhibit 219 for identification? Can you tell us what that is?

A. This is a distribution sheet, the record which we keep in our office showing the distribution of the Niagara brochure, dated July 25, 1957.

Q. Does the power authority keep records of the distribution of all of its brochures?

A. It does.

Q. And does it do it for each individual brochure?

A. That is right.

Q. Is that a record kept in the regular course of business by the authority?

A. That is right.

Q. And you say that 219 for identification is a record kept in the regular course of business with respect to the distribution of Exhibit 218 for identification?

A. That is right.

Q. And what does that indicate so far as distribution to Members of the House of Representatives is concerned?

A. Under Category U1b, which is our mailing category, why, we mail to all of the U.S.—United States Representatives.

Q. A copy of this brochure 218?

[fol. 4879] A. That is right.

Mr. Rosenman: I ask that 218 and 219 be received in evidence.

Mr. Lazarus: Same objection as before, Your Honor.

Presiding Examiner: I will permit you to preserve your objection, and it will be received.

(The documents above referred to, heretofore marked for identification as Exhibits Nos. 218 and 219, were received in evidence.)

[fol. 4880] Mr. Rosenman: I ask that a letter on the letterhead of the Power Authority of the State of New York, addressed to the members of the Senate of the United States, dated August 8, 1957, be given a number; and also a distribution sheet attached to it.

Presiding Examiner: It will be marked Exhibit 220 for identification.

(The document referred to was marked for identification as Exhibit No. 220.)

Presiding Examiner: Do you want the distribution sheet marked as a separate exhibit?

Mr. Rosenman: Please.

Presiding Examiner: The distribution sheet will be marked Exhibit 221 for identification.

(The document referred to was marked for identification as Exhibit No. 221.)

By Mr. Rosenman:

Q. I show you Exhibit 220 for identification and ask you to tell us what this was?

Mr. Lazarus: Same objection to this one, of course, Your Honor.

Presiding Examiner: It will be so noted.

The Witness: This was a letter to the members of the Senate of the United States to which was attached the brochure, Exhibit 218.

[fol. 4881] By Mr. Rosenman:

Q. Do you notice the last paragraph of the front page refers to the brochure which has been marked Exhibit 218?

A. That is right.

Q. And was this sent to each member of the Senate of the United States?

A. This was hand-delivered to all of the members of the Senate.

Q. Referring to Exhibit 221 for identification, is that a record kept in the regular course of business along with the other records you have spoken about by the Power Authority?

A. That is right.

Q. And that shows the distribution of Exhibit 220, does it not?

A. That is correct.

Q. What does it show with respect to the members of the Senate?

A. This shows, the first item "Members of Senate—Hand-Delivered."

Q. What does that indicate?

A. That indicates this brochure was sent to the Senate Office Building and was hand-delivered to all the members.

. . . . . .

[fol. 4882] Q. Now were you present at a hearing of the Public Works Committee of the House of Representatives on June 28, 1956, which was a year before these brochures to which you have just testified?

A. I was.

Q. Did you hear the testimony delivered at that time?

Mr. Lazarus: Objection, Your Honor. The testimony delivered at that time is a matter of public record. Whether this witness heard it or not is immaterial. What this witness says about what was said is incompetent. Of course legislative history itself is not before this Commission. And furthermore, testimony with respect to legislative history is not competent. I object to this line of questioning.

Presiding Examiner: Well I assume, Mr. Lazarus, that Judge Rosenman will either offer the printed document in [fol. 4883] evidence, or ask this witness if he was present and heard certain parts of the printed document read into evidence, read into hearings, or orally stated in hearings.

Mr. Rosenman: I am going to ask the Examiner to take official notice of this document, but in the document there was reference in the testimony to a map and to a model which is not reproduced in the testimony. I want to ask the witness about the map and about the model.

Presiding Examiner: Under the rules of evidence of the Federal Power Commission we can take judicial notice of such documents, or parts thereof, if our attention is drawn to those parts specifically.

Mr. Lazarus: Your Honor, I have no question that you may take judicial notice of this document. My exact point is that all the Power Authority may do is direct your attention to the document, or to portions thereof, that we cannot have testimony from a witness trying to explain to us what is in the document or tell us something other than

appears in the document. Because the document is all that is in the legislative history. And I would have absolutely no objection if the Judge wanted to put that whole document into the record, and any other printed document, the hearings, the committee reports, the debates on the Floor of the Senate. All of those, if they want to put them in the record, I have no objection to it whatsoever because those are the things that were referred to by the Court of Appeals [fol. 4884] in its opinion and are quite obviously matters of judicial notice, both in court and in the Commission. But what the Power Authority is trying to do here is to vary the legislative history by introducing testimony which is not printed and not published and was not before Congress. And I do not think that is competent legislative history.

* * * * * * * *

[fol. 4886] Q. Did you hear Major Garrett of the Corps of Engineers testify on that occasion?

A. I did.

Q. On page 7 he said:

"If I may refer to this map I have here, I would first of all like to point out some of the existing developments in the Niagara area."

Do you recall that?

A. I do.

Q. Do you also recall at the same hearing Mr. Moore testifying?

A. I do.

Q. And do you recall, on page 28, there was a colloquy between Congressman Dondero and Mr. Moore in which the Congressman said—Question:

"You referred to that yellow line. That is on the Canadian side of the river."

[fol. 4887] Answer, by Mr. Moore:

"I did not see that map. I was on the other side of it when the Major was talking. I know the model and there are two yellow dots where the covered conduits were planned, and those two yellow dots point out where it is."

Did you see the map which was referred to by Major Garrett and the model which was referred to by Mr. Moore?

A. I did.

Q. Now will you describe first the model?

Mr. Lazarus: Objection, Your Honor. The model and the map are apparently not part of the legislative history because they are not in the official reports of Congress. Therefore, anything this witness has to say about them with respect to legislative history is irrelevant. What he can testify to is incompetent. So I shall renew my objection as Judge Rosenman says, on the grounds stated.

Presiding Examiner: Did you help prepare the map, Colonel?

The Witness: I helped prepare the model.

By Mr. Rosenman:

Q. Did you see the map at the time?

A. I saw the map at the time.

Q. Did you study it?

A. I studied the map at the time.

Mr. Rosenman: Neither of those items are in the document, and I want this witness to testify what the map and [fol. 4888] the model indicated.

Mr. Lazarus: Your Honor, as I have said, the legislative history is what is in the document, not what this witness happened to see or work on.

Presiding Examiner: Subject to you being heard later on we will overrule your objection at this time and let him testify.

By Mr. Rosenman:

Q. First of all will you describe the model that was present at this hearing before the members of the committee?

Mr. Lazarus: Your Honor, I object. Now we have only the witness' recollection of what a model looked like. Perhaps we can have the model in here so we can see, so the rest of us can see. We are just running far afield. We have no way of checking upon what this witness says. The model is not in the record, the model is not here. Neither is

the map here. There is absolutely no chance for me to cross-examine the man on the subject. He could say the model had, in letters 3 inches high on it, "Tuscarora Reservation," and we would absolutely have no way of checking on it. Either it is in the record, or the model is brought in, or the map is brought in. Otherwise, I think this testimony is incompetent.

Presiding Examiner: Judge, what do you expect to prove by this witness?

Mr. Rosenman: That the location of the reservoir was, as indicated in the other exhibit, at the site which is occu- [fol. 4889] pied by the reservation. Not exactly the same, but to the same tenor as that map which we showed you the other day and which was marked in evidence as Exhibit No. 191. It was a different size reservoir, as the witness will testify, but it was in approximately the same location. The Army Engineers' map was a much smaller reservoir because their plan was entirely different from ours. But they were in approximately the same location.

Presiding Examiner: And from that you hope to prove that Congress had in mind the taking of some Tuscarora land at the time they passed the 1957 Act?

Mr. Rosenman: Yes, sir. If Your Honor will recall the opinion in the Second Circuit, there was a great deal of discussion of that subject.

Mr. Lazarus: Your Honor, this is just depriving me of my right to cross-examine. I might just as well leave the room while this witness is testifying because I have absolutely no way of checking on it.

Presiding Examiner: All I am trying to do now is to determine whether or not the testimony of this witness is admissible, and that is—

Mr. Rosenman: We think this is material and relevant and very important in connection with the duty of the Commission to make its findings under 10(a) of developing a comprehensive plan for the beneficial use of the community, [fol. 4890] and it is in line with the mandate which Congress has given us. We think it is very material that the Commission know what was before Congress when it passed the legislation.

Mr. Hobbs: As I understand the testimony of the witness, he helped prepare this model.

Presiding Examiner: That is a question that I asked him, if he helped prepare the model.

Mr. Lazarus, I am going to let him testify, and then I will hear you later on on the subject.

. . . . . .

[fol. 4891] By Mr. Rosenman:

Q. Will you describe the model first, Colonel?

A. The model provided for a power house at the same location, main power house at the same location, as the Lewiston power house is now situated; for a proper generating station at the same location that the Tuscarora power house is now located; it provided for cotton covered conduits from the Tuscarora power house to the Niagara River upstream of the falls; it provided for a reservoir of approximately 40,000 acre feet, and this reservoir was situated east of Military Road—

Q. Is this Military Road, this diagonal line?

A. That is right. —south of Upper Mountain Road—

Q. Is this Upper Mountain Road indicated by the line at the top of the picture?

A. That is right. —and north of Saunders Settlement Road.

Q. And Saunders Settlement Road runs through the pink area on 202, does it not?

A. That is right. This reservoir was in the same general location as the reservoir as now contemplated, although it was not quite the same, it did not have quite the same acre feet.

Q. Do you remember how many acres of land were covered by the reservoir?

A. Yes, I believe that this reservoir required about 1,700 acres.

[fol. 4892] Q. At the time when this model was constructed, had you or anyone under your direction made any precise studies with respect to the location of the reservoir, and I mean by actual meet and bound?

A. No, precise studies had not been made because the detail surveys for the project had not been made. These were preliminary studies based upon the available information at the time.

Q. Now you heard what I read from Major Garrett's testimony with respect to a map. This map had been prepared by the Army Engineers, had it?

A. That is right.

Q. And this was a discussion of the plan of the Army Engineers, was it not?

A. That is correct.

Q. That Major Garrett was carrying on?

A. That is right.

Q. Now did that map show a plan for the Niagara development?

A. It did.

Q. And will you describe that map and what it showed?

A. The Corps of Engineers' plan showed the Lewiston and Tuscarora power houses in approximately the same position as located on the model. It showed the intake in the Niagara River at approximately the same location, and it [fol. 4893] showed alternate schemes for either an open canal or tunnels running from the intake in the Niagara River directly to the Lewiston power house.

Q. Will you explain what you mean by tunnel? That is not the same as the conduit, is it?

A. No, these tunnels were deep tunnels, roughly 200 to 300 feet below the surface.

Q. And you say this map showed alternate methods of conveying the water, one was by an open canal and one was by deep tunnels?

A. That is right. The map further showed either that the water would be conducted from the Forebay of the Lewiston power house to a reservoir, high storage reservoir, by open canals or by tunnels. The alternate was there. And it further showed a reservoir in approximately the same location as the reservoir previously described, that is, between Military Road, Saunders Settlement Road and Upper Mountain Road.

Q. In the same general locality?

A. That is right. One other feature of the map was that it provided a future tunnel from the Schoellkopf plant to the Lewiston power house designed to pick up the lost head as a result of the fact that the Lewiston power house is upstream a considerable distance—the Schoellkopf plant is

upstream a considerable distance from the Lewiston power house.

Q. What was the size of the reservoir shown on the Army [fol. 4894] Engineers' map?

A. That was a 30,000 acre foot reservoir.

Q. And do you recall the number of acres, approximately, that was included?

A. I believe it was about 1,200 acres, but I am not absolutely—

Q. Approximately?

A. Approximately, yes.

Q. At this date had the Schoellkopf plant fallen into the river?

A. The map was predicated—

Mr. Lazarus: Answer the question.

The Witness: May I have the date again? The hearing date was on—

Mr. Rosenman: I have it.

The Witness: The Schoellkopf plant collapsed into the river on June 7, 1956, and the hearing date was June 28, 1956.

By Mr. Rosenman:

Q. So this was approximately three weeks after the plant had fallen into the river, is that right?

A. That is right.

Q. Now under the Army plan will you explain the course of the water again?

A. Under the Army plan the water would flow directly to the Forebay of the Lewiston power house—

[fol. 4895] Q. On the gorge?

A. At the gorge.

Q. Yes.

A. —and the excess water which was not used there would be backed up to the Tuscarora Reservoir and pumped up into a pump storage reservoir.

Q. And it is your testimony that the general size and shape and location of the reservoir was the same on the Army Engineers' map as it was on the model you talked about except as to size?

A. That is right.

Q. Now was this a model of the entire project or just of the reservoir?

A. This was a model of the entire project.

Q. Approximately what was the size of it?

A. About, I judge, 8 feet long and 3½, 4 feet wide.

* * * * * * *

[fol. 4896] Presiding Examiner: Gentlemen, are you ready to proceed?

Mr. Rosenman: Mr. Examiner, I was going to read into the record some pages, some of the testimony; instead of doing it, I think it would save time if I gave the stenographer a copy of what I wanted to read and also give it to the other side and the other parties and have the stenographer copy it right in.

Presiding Examiner: What has it been copied from?

Mr. Rosenman: It has been copied from the item.

Presiding Examiner: It has been copied from there and so identified.

Mr. Rosenman: That's right.

Presiding Examiner: The pages are at the end of each excerpt. Will that be satisfactory?

Mr. Rosenman: It will save the time of reading it.

Presiding Examiner: Yes.

Mr. Lazarus: No objection. Just to see if it is accurate.

Presiding Examiner: Just give it to the reporter and it will be incorporated into the record at this point.

(The document referred to is as follows:)

Excerpts from Transcript of Hearing before House Public Works Committee 84th Congress, 2nd Session, on Niagara Redevelopment Act, June 28, 1956.

Mr. Fallon: I also understand that most of this property [fol. 4897] has been acquired by the Niagara Mohawk Power Co. Where is the New York Power Authority going to build the plant if granted a license?

Mr. Moore: I would much prefer the engineers answer that question, but I am sure the powerplant will be in the same place, no matter who builds it.

Mr. Fallon: How will you acquire the property?

Mr. Moore: We have four methods under statutes we are using on the St. Lawrence. There are two different

condemnation acts we have available in the State. There is a State appropriation act available and a Federal Power Act condemnation procedure available. As far as the Niagara is concerned, we have 2 separate State condemnation acts available, 1 in the Power Authority Act itself and the other in the general condemnation law. The Federal Power Commission procedure is available, and as far as the appropriation procedure is concerned an amendment to the State law I think would be required specifically to apply it to Niagara, but I think it can be done.

Mr. Fallon: Mr. Moore, if you do not find a willing seller in this project, how long would it take you to acquire the land?

Mr. Moore: On the St. Lawrence we have at least 99 per cent of all the land now, and we have not been in business 2 years yet. I assume we would go just as fast here.

Mr. Fallon: How long?

[fol. 4898] Mr. Moore: In the St. Lawrence we had it all—we started—we broke ground August 10, 1954, and we had all of the land at the end of 1955.

Mr. Fallon: It took you a year to acquire it on the St. Lawrence?

(5)

Mr. Moore: We could have done it faster. We had much more land on the St. Lawrence because there we were flooding an area 35 miles long.

Mr. Fallon: Did you have any appeals on the St. Lawrence?

Mr. Moore: We have had 2 claims filed so far in the Court of Claims for money damages and we have 1 equity suit in the Supreme Court in the northern part of New York State, with respect to our right to take some particular pieces of property, and that is all. That is all the litigation we have on land up to this time. We have settled with a substantial number.

Mr. Fallon: Suppose you find not only an unwilling seller, but an obstinate seller? How far could he take you before you acquired the property?

Mr. Moore: He could not—we could get possession immediately after filing certain papers and going through cer-

tain processes before the question of damages comes up at all. We would get possession. If the man refused to move off the property, of course we have to go through court [fol. 4899] procedure to dispossess him. Normally it would not take very long. I should say 2 months.

Mr. Fallon: Two months?

Mr. Moore: Yes, sir.

Mr. Smith: Will the gentleman yield?

Mr. Fallon: Yes.

Mr. Smith: Mr. Moore, the power company could have the same trouble in acquiring the rest of their needed land. Is that right?

Mr. Moore: I think the power company would probably have more, because under the law under which power companies operate I believe, and Mr. Martin can tell you better than I can, I am sure, but I believe under those laws the court has to determine the question of necessity, as well as the amount of damages; whereas, under the procedures which the power authority uses the authority has the right to determine the necessity and the court determines, if there is no agreement, the amount of damages.

(6)

I must say here, I must say one of our statutes is much better than the other and much more expeditious (pp. 23-24).

Mr. Dondero: One or two more questions and I am through. At the present time does the Power Authority of the State of New York have any property of any kind in the area of Niagara Falls and the Niagara River?

Mr. Moore: The New York Power Authority there does [fol. 4900] not own any property at all. The State of New York does own considerable property in that area. It has a rather extensive park, although not nearly so nice as on the Canadian side. In fact, it is a terrible mess on our side. The power authority intends to build a beautiful park, as you know, along the parapet of the river.

Mr. Dondero: I will simplify the question. Has the State Authority of the State of New York any property in that area which is suitable or usable for the production of power?

Mr. Moore: Yes, sir; it has this property: It has the right and it is a property right—it has the right to the use of the waters of the Niagara River for power purposes.

Mr. Dondero: But you own no real estate?

Mr. Moore: That is real estate. It owns the bed of the Niagara River.

Mr. Dondero: And you have no powerplants and no installations?

Mr. Moore: No powerplant there, but we will have for the use of the same water on the St. Lawrence in 2 years.

Mr. Dondero: Just a moment. Can you answer that?

Mr. Moore: We have no powerplant on the Niagara. The answer is "No."

Mr. Dondero: And you own no transmission lines in that area?

[fol. 4901] (7)

Mr. Moore: No, sir; we do not, but we do own the right to use the water and we do own the bed of the river, and claim nobody has the right to take it away from the State of New York.

Mr. Dondero: We understand New York makes the claim, but outside of that all of the means used for the production of power in the Niagara area are owned and used by the private power companies operating in that area today, and that has been the case for 50 years. Is that correct?

Mr. Moore: For many years. I think you will find there were manufacturing establishments which owned the powerplants, but they are private companies in one form or another. I think the Niagara Mohawk by merger or otherwise acquired all of the facilities.

Mr. Dondero: If the State of New York obtains the right to develop this power you must either buy or condemn from the private power companies the propery which they now own and use for the same purpose?

Mr. Moore: No; they are not using it for the same purpose. The power companies acquired a lot of land with the idea of using it for the same purpose, but the property the private companies now use for power purposes is different from those that will be used for this development. You can see that—

Mr. Dondero: Can we dispute that on the map the engineers have drawn that the private power companies do [fol. 4902] own that at the present time?

Mr. Moore: There is a distinction. The private power companies own several types of property. They own 2 powerplants, 1 of which has been pretty much destroyed, and they own the tunnels which bring the water to these 2 powerplants. They also own distribution facilities and transmission lines to take power out of the city. But in addition to that they have acquired some property which I think you will find is the yellow line there, anticipating building this development. In other words, the power companies or their predecessors in interest have gone out and acquired property lying there. Some of it may have buildings on it. I do not know. But they acquired it for the purpose of building this development. They are not using it now for power purposes and it is not being used at all.

(8)

Mr. Clark: May I make an observation, Mr. Chairman?

Mr. Dondero: Just a moment. Suppose what you are saying is true. You would still have to condemn or buy the property which they own to build a plant at Lewiston. Is that right?

Mr. Moore: We would have to condemn or buy from private people the land necessary for this project. In some cases it is Niagara Mohawk, and I assume in some cases others.

Mr. Dondero: When you say "private people" you mean private power companies?

[fol. 4903] Mr. Moore: They may be individuals, or farmers, or schoolteachers, or anything.

Mr. Dondero: You referred to that yellow line. That is on the Canadian side of the river.

Mr. Moore: I did not see that map. I was on the other side of it when the major was talking. I know the model and there are 2 yellow dots where the covered conduits were planned, and those 2 yellow dots point out where it is.

* * *

Mr. Clark: On this dotted line here does the Authority of New York which you represent, own any of the land right along here?

Mr. Moore: The answer is "No"; not above the high-water line (pp. 27-28).

• • •

Mr. Cramer: Under your proposal what happens to the Schoellkopf plant?

Mr. Moore: Nothing.

Mr. Cramer: I understand your proposal is, No. 1, the company would waive the right it has under its Federal Power Commission license which does not expire until 1971?

(9)

Mr. Moore: That is right. The Schoellkopf plant would not be rebuilt and the Adams plant, another plant upstream which uses only half of the head or 165 feet but uses some [fol. 4904] 8,800 feet of water—would be used only until the new plant was available and ready to use all of the water available; and the Adams plant would also be abandoned under that plan (pp. 38-39).

[fol. 4905] By Mr. Rosenman:

Q. Were you present at the hearings held before the sub-committee of the Committee on Public Works of the Senate on April 10, 11, 12 and 13 of 1957?

Mr. Lazarus: I have the same objection, Your Honor.

Presiding Examiner: It will be so noted.

The Witness: Yes, I was.

Mr. Rosenman: The official document of those hearings is Item IV in this hearing.

By Mr. Rosenman:

Q. Who else was present representing the Authority?

A. The Authority was represented by Chairman Moses, Trustees Poletter, Wilson, Burton, Judge Rosenman, Mr. Moore, Mr. Tolliver, Mr. Donahue, Mr. Charles Gletz.

Q. And those hearings—

A. And George Rich was there, as I think he testified yesterday.

Q. According to the official report, these hearings lasted four days. Do you recall that?

A. I do.

Q. And were you one of those who stayed through the entire four days?

A. That is right.

Q. Did Mr. Moore stay there with you?

A. He did.

[fol. 4906] Q. During these hearings will you tell us what material was furnished by the Power Authority to the members of the Committee?

A. The Power Authority furnished a packet to the members of the Committee in which our recent brochures and other information was contained.

Q. You mean a folder?

A. A folder.

Q. And do you remember what was in that folder?

A. I recall that our annual report, our 1956 annual report, was in that folder.

Q. That is Exhibit 191 in evidence?

A. That's right. And a marketing brochure that explained the marketing policies of the Authority that was dated I believe January 30, 1957.

Q. I show you this pamphlet, this brochure entitled "Power Marketing." Was this contained in the folder?

A. That was contained in the folder.

Q. Is that what you are referring to?

A. That is right.

Mr. Rosenman: May I have a number for this?

Presiding Examiner: It will be marked Exhibit 222.

(The document referred to was marked for identification as Exhibit No. 222.)

By Mr. Rosenman:

[fol. 4907] Q. Do you recall this map on pages 40 and 41 of Exhibit 191?

A. I do.

Q. Was that examined by the members of the Committee?

Mr. Lazarus: Objection, Your Honor. How can we possibly check on this. The written record will show what was before the members of Congress. This is wholly incompetent testimony.

Presiding Examiner: Judge, I think he can show that he presented it to the members of the Committee present. Whether they looked at it or not is another matter.

By Mr. Rosenman:

Q. Can you state of your own knowledge whether or not they looked at it?

A. I observed each and every member of the Committee, and I observed that each and every member of the Committee—

Mr. Lazarus: His testimony is highly incompetent. If he wants to bring in the Senators and find out if they read it, that wouldn't even be competent as a matter of fact. But certainly he cannot tell us what the Senator was thinking of, even if he leafed through the brochure.

Mr. Rosenman: It seems to me that it would be competent to testify what the Examiner has looked at, that he has looked at that book on his desk (indicating).

Presiding Examiner: If he saw the Senator was looking at it, why that can be admitted.

[fol. 4908] The Witness: I observed that each member of the Committee looked at the brochures and the folder.

* * * * * * *

Q. Do you know what Mr. Moore was referring to when he said "It is in the brochure, in the folder?"

Mr. Lazarus: Objection.

Mr. Rosenman: Can I finish the question?

By Mr. Rosenman:

Q. "It is in the brochure, in the folder about the marketing of St. Lawrence power."

[fol. 4909] What was the folder that Mr. Moore was referring to?

A. Mr. Moore was referring to the folder which—

Mr. Lazarus: Your Honor, Mr. Moore is in the room as a matter of fact. Mr. Moore's testimony would not be competent, but this witness' testimony as to what Mr. Moore was referring to is doubly incompetent.

Mr. Rosenman: Do you want Mr. Moore to state what he is referring to?

Mr. Lazarus: If Mr. Moore comes on the stand, I will object to Mr. Moore's testimony, but right now I am dealing with this witness.

Presiding Examiner: Your objection will be preserved and the witness may answer.

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Q. And Exhibit 191 you say was in that folder?

A. That's right.

Q. Now I call your attention to the following question by Senator Kerr which appears in the transcript at page 119:

"Senator Kerr. Do you have map of the Niagara River or that part of it that will be affected by this bill?

"Mr. Moore. Yes, sir.

[fol. 4910] "Senator Kerr. Is it within the State of New York?

"Mr. Moore. Yes, sir, it is on the Canadian border."

Do you know which map Mr. Moore was referring to?

A. Mr. Moore was referring to the map which is contained in the brochure.

Mr. Hobbs: Exhibit 191.

The Witness: 191, yes.

By Mr. Rosenman:

Q. At page 40 to 41?

A. That is right.

Q. This appears at page 119 of the transcript. You have that. By the brochure you mean Exhibit 191 in evidence?

A. That is correct.

Q. And the map is printed at page 40 to 41?

A. That is correct.

Mr. Rosenman: May I ask that this document dated January 28, 1957 entitled "Memorandum to Files From Ines Seagnelli" be given a number?

Presiding Examiner: It will be marked Exhibit 223 for identification.

(The document referred to was marked for identification as Exhibit No. 223.)

By Mr. Rosenman:

Q. I show you Exhibit 223 for identification and ask you to tell me what that is.

[fol. 4911] A. This is a record of the distribution of the 1956 annual report.

Q. Is that Exhibit 191 in evidence?

A. That is Exhibit 491 in evidence.

Q. Is this one of the records kept in the regular course of business by the Authority?

A. That's right.

Q. Showing the distribution of the brochure Exhibit 191?

A. That is correct.

Q. Will you look at page 2. What does it show with respect to the distribution of this pamphlet to members of the Senate and of the House of Representatives?

A. Page 2 under "S. 1D" shows that the brochure was distributed to the U.S. Senators and the Congressmen in New York State.

Q. And how many were distributed?

A. 42.

Q. What does S. 1D mean?

A. That is the category in our mailing list.

Q. Now would you look further down as to its distribution to the members of the Senate committee?

A. Under "U 1C" 13 copies went to the Senate Public Works Committee, and under "U 1D" 34 copies to the House of Representatives Public Works Committee.

[fol. 4912] Q. And the "U 1C" indicates what, and "U 1D"?

A. That is the designation of the category on our mailing list.

Mr. Rosenman: I ask that Exhibit 223 be received in evidence.

Mr. Lazarus: Same objection.

Presiding Examiner: It will be admitted subject to the objection.

(The document referred to, heretofore marked for identification as Exhibit No. 223 was received in evidence.)

By Mr. Rosenman:

Q. These mailings that you just testified to from Exhibit 223 as I understand it were in addition to the folder which was distributed to the members of the subcommittee at the hearing, is that correct?

A. That is right, the folder was hand delivered, delivered at the hearing.

Q. And these other items were mailed subsequently?

A. No, these were mailed at the time, the date, the release of the brochure.

Q. On January 28th?

A. On Monday, January 28th. You will note that some of the lists were mailed on January the 25th, and the remainder on January 28th. As a matter of fact, there was a further mailing on Tuesday, January the 29th.

[fol. 4913] Q. That is all indicated on Exhibit 223?

A. That's right.

* * * * * * *

[fol. 4919] Mr. Rosenman: I would also like to call your Honor's attention to some of the material in Exhibit 191 in evidence and ask Mr. Chapin about it.

By Mr. Rosenman:

Q. On page 43 of the exhibit, Mr. Chapin, I call your attention to the statement on page 43 of this Exhibit 191 reading as follows:

"Both the reservoir and the open channel are in open country, and the required safety protection can be applied effectively in either situation."

Can you tell us in what open country the reservoir was planned to be built?

A. Well, the reservoir was as shown on the plan, bounded on the west by—

Mr. Lazarus: That is a sufficient answer, your Honor.

The Witness: (continuing) —Military Road, on the north by Upper Mountain Road and on the south by Saunders Settlement Road.

By Mr. Rosenman:

Q. Colonel Chapin, I want to ask you, you have heard the testimony and you have given some testimony about this alternate reservoir site on Exhibit 202 and Exhibit 165 colored in pink.

I want to ask you whether in your opinion as an engineer and with your experience as Manager of the St. Lawrence [fol. 4920] Project and Manager of the Niagara Project and with your other experience, whether you consider this alternate reservoir a practical alternate to the reservoir presently contemplated?

A. I do not consider it to be a practical alternate. I do not consider it to be feasible. I do not think that within the time that we have to complete this project, which is just about 800 days from now, that that area could be acquired, or litigation disposed of, the houses moved, the cemeteries moved and the construction carried out to fit into the very tight schedule which we have for the entire project.

Q. In line with your testimony, Colonel Chapin, do you know of any other open country within this area which could possibly be used for a reservoir of this size?

A. No, I know of no area that could be used for this purpose.

Q. So that when the words "open country" were used on page 43, this was clearly within the contemplation of the authority?

A. That's right.

Mr. Rosenman: That is all of this witness.

Presiding Examiner: Mr. Lazarus.

Cross examination.

By Mr. Lazarus:

Q. May I have Exhibit 191? Colonel Chapin, on direct examination you just referred to a statement on page 43 of [fol. 4921] the brochure which is Exhibit 191 where it is stated that the reservoir would be in open country, and then you were asked to describe the reservoir as it appears on the map on page 40 of this brochure, and you did so by giving us the boundaries by way of roads. Am I correct?

A. That's right.

Q. You mentioned Walmore Road and Saunders Settlement Road?

A. I didn't mention Walmore Road. I mentioned Upper Mountain Road and Saunders Settlement Road.

Q. Now I show you the map on page 40 and perhaps you will tell me whether the names of those roads appear on the map.

A. The names are not on the map.

Q. In other words, someone looking at the map would not know of those roads or what the boundaries are of the reservation in terms of roads, am I correct, just by looking at this map?

A. By looking at the map they would not recognize—they would recognize Military Road, which is indicated on the map, and Saunders Settlement Road is an extension of Whitmer Road.

Q. Now by looking at this map and by looking at this map alone, can you tell whether the area to the right of this pink area is open country or not, just by looking at this map?

[fol. 4922] A. The map does not show topography nor property lines.

Q. Does the map indicate where the Tuscarora Reservation is?

A. No, the map does not show property lines.

Q. You are familiar with this. But it does show where the Lewiston power house is?

A. That's right.

Q. And where Niagara University is?

A. Right.

Q. But it does not show where the Tuscarora Reservation is?

A. It does not specifically mention the Tuscarora Reservation.

Q. In Exhibit No. 191, this brochure, is it anywhere stated in so many words that the proposed reservoir will cover land within the Tuscarora Reservation?

A. No, I do not see it mentioned.

Q. Do the words "Tuscarora Reservation" appear in this brochure at all?

A. I do not believe they do.

Q. Is there any reference in this brochure to Indian lands at all?

A. No. As I said before, that we didn't put property lines on because we hadn't determined at this stage. This map was made up as a map showing the general area, and [fol. 4923] we had not determined the exact boundaries of either the Niagara Mohawk, the Tuscarora Reservation or the other lands; many of the lands which we had to acquire; which we have acquired.

Q. As a matter of fact, you hadn't at this point even determined the exact boundaries of the reservoir, had you?

A. At this point the exact boundaries had not been determined. The general location had.

Q. Exhibit No. 223 in evidence is one of the records you keep of the distribution of brochures. Now would you refresh my recollection? This is the distribution of the 1956 Annual Report, am I correct?

A. That's right.

Q. Is that 191 again?

A. That is correct.

Q. Now on this mailing list it is stated that a number of copies of the 1956 Report were mailed to Members of the Senate and the House of Representatives. Will you swear that the brochure was read by every single person to whom it was mailed?

A. No, I will not swear as to that.

Q. How many Congressmen and Senators will you swear read it?

A. I will not swear that any Congressman or Senator read it because I do not know that they read it at the time it was mailed to them.

[fol. 4924] Q. Getting to Exhibit No. 221, which is attached to Exhibit No. 220 and Exhibit No. 220 refers to a brochure which was prepared for the Members of the House of Representatives which is I believe Exhibit 218, according to your records and Exhibit 221, Exhibit No. 220 together with Exhibit 218 were hand delivered to all Members of the Senate. Will you swear that this brochure was read by all of the Members of the Senate?

A. No, I will not.

Q. How many Senators will you swear read this brochure?

A. I will not swear that any Senator read this brochure at the time of distribution.

Q. Or at any time?

A. I previously testified that I observed in the Senate committee, I observed the Senators in the committee room looking through the brochure.

Q. Looking through the brochure?

A. That's right.

Q. How many Senators were in the committee room at that time?

A. The number varied from, oh, there were probably anywhere from 10 or a dozen, and at certain times it was reduced as a result of Senators coming and going.

Q. How many will you swear looked through the brochure?

A. I think I can say that every Senator that came in and sat down in his place opened up the brochure and looked [fol. 4925] at it.

Q. At the time of the testimony with regard to the map on pages 8 and 9 of Exhibit No. 218, how many Senators would you say were in the room?

A. I don't have the exhibit number.

Q. This is 218. This is the brochure that was first distributed to the House of Representatives.

Mr. Rosenman: Which one?

Mr. Lazarus: 218, there is a map in the center portion.

Mr. Rosenman: What is the question?

By Mr. Lazarus:

Q. How many Senators were present at the time reference was made to the map?

A. This was not the brochure that was referred to in my testimony in the packet. My testimony referred to 219 and the power marketing report.

Q. I see, 219 that number was?

A. I don't have the exhibit numbers on my copies.

Q. I believe that is probably 222 which has not been introduced in evidence yet. Well, looking then at 222—

Mr. Rosenman: That is 191.

Mr. Lazarus: Is this 222?

Mr. Rosenman: Yes.

Mr. Lazarus: Did you not refer to a map in here?

Mr. Rosenman: No. That was not marked in evidence. [fol. 4926] That was one of the other contents of the folder, and it is really not material to anything here. That is why I haven't offered it in evidence.

By Mr. Lazarus:

Q. Which was the other? There were two items in that packet.

A. That's right.

Q. One was this one labeled Power Marketing. Which was the other one?

A. The 1956 Annual Report of the Authority.

Q. And that is the one with the map on page 40?

A. That's correct.

Q. And how many Senators were in the room at the time reference was made to that map?

A. That brochure, that folder, was in front of every Member, and it was referred to, used more than once. And so it could be ten or a dozen.

[fol. 4927] Q. Now with respect to Exhibit 218, which according to Exhibit 219 was distributed to every member of the United States House of Representatives, will you swear that every Representative read Exhibit 218?

A. No, I will not.

Q. How many Representatives will you swear read it Exhibit 218?

A. I will not swear that any Representative read Exhibit 218.

Q. Looking at Exhibit 220, which was hand-delivered to every member of the Senate—

Mr. Rosenman: Not 220.

Mr. Lazarus: 220 was according to 221 hand-delivered to every member of the Senate.

By Mr. Lazarus:

Q. Does Exhibit No. 220 refer to the Tuscarora Reservation?

A. It does not specifically mention the Tuscarora Reservation.

Q. Does Exhibit 220 at any place inform the reader that Indian lands may be required for the proposed reservoir?

A. It does not specifically mention Indian lands.

Q. Looking at Exhibit No. 218, does Exhibit No. 218 anywhere mention the Tuscarora Reservation?

A. On a quick perusal I do not see any mention of the Tuscarora Reservation.

[fol. 4928] Q. Does Exhibit No. 218 inform the reader that Indian land may be required for the proposed reservoir?

A. I do not believe it does.

Q. Looking at the inside cover of Exhibit No. 218, it stated that the reservoir has a storage capacity proposed of 60,000 acre feet. Does the front cover anywhere state, or is it anywhere stated that the 60,000 acre feet are to be located in part or in whole upon the Tuscarora Reservation?

A. It does not state so on the front cover.

Q. Does it anywhere state in Exhibit 191 or Exhibit 218 or Exhibit 220 that the creation of a reservoir of 60,000 acre feet will require either, one, part of the Tuscarora Reservation or, two, any Indian lands?

A. You said 218, 220?

Q. 220, which is the short letter to the Senators and 191.

A. There was no specific mention.

Q. Of either Tuscarora Reservation or Indian lands?

A. That's right.

Q. Now you have testified with respect to a model that you claim was in a hearing room at the time that there was testimony in the House of Representatives. We are somewhat handicapped by not having that model here and not having it anywhere else in the record. Can you tell me where the model is?

[fol. 4929] A. Yes. That model is in Niagara Falls.

Q. I see. On that model that—

Presiding Examiner: Mr. Lazarus, I don't know that this is it. I note there is a picture of the model.

By Mr. Lazarus:

Q. On Exhibit 191, is that the model?

A. That is a picture of the model, that is right.

Q. Is it anywhere stated on that model that the lands to be covered by the proposed reservoir—first let me say did that proposed reservoir at all cover Tuscarora lands?

A. Oh yes, the reservoir on that model, as you can see in the picture in the upper left-hand corner, the reservoir is in the same location as the reservoir described in this brochure.

Q. Do the words "Tuscarora Reservation" appear on the model?

A. I couldn't—

Q. Or did they then, not do they now?

A. I couldn't say. I couldn't say whether they do or not. I wouldn't say they do.

Q. Consistent with what was in the brochure, the words would not have appeared, would they?

A. I would say this. Consistent with the fact that at that time we had not located property lines throughout the project, why the Tuscarora Reservation probably did not show.

[fol. 4930] Q. Now you have told me or testified that the reservoir on this model included 1,700 acres, am I correct?

A. That's right.

Q. That is somewhat smaller than the reservoir you now plan?

A. Yes, because this model was prepared before the collapse of the Schoellkopf plant and was used here a very few weeks after the collapse of the Schoellkopf plant.

Q. Even at the hearings before the Federal Power Commission which ended in December, was it not true—this is December of 1957—that the Power Authority was not then contemplating taking 1,383 acres of Tuscarora land?

A. The Power Authority was taking 60,000 acre feet, and that had not been completely translated into acreage, definitively translated at that time, although the general area was shown. It was slightly underneath that at that time.

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[fol. 4932] Q. You have testified at some length on direct examination about the contractual commitments entered into by the Power Authority and the financial dealings of the Power Authority and the work that has already been done on the project.

Now I believe you testified on direct examination that your contract, your loan from the banks, the interim loan, was entered into on February 1, 1958, is that correct?

A. That's right.

Q. And this was two days after the license originally issued by the Commission?

A. It was within three or four days—it may have been February 3, but was the 1st of February. It was within three or four days afterwards. I think it was February 3, four days afterwards.

Q. It was after the license was issued?

A. That's right.

Q. These contracts that you entered into, were they made before the license was issued or after the license was issued?

[fol. 4933] A. After.

Q. The work on the site which is in progress, was this started before the license was issued or after the license was issued?

A. You mean actual construction?

Q. The work on the site that you testified to that is now in progress, yes, construction.

A. Construction was started after the license was issued.

Q. When did you first know that the Tuscarora Indians were going to contest the right of the Power Authority to acquire any lands within the reservation?

A. That is a matter of record that I couldn't give you the specific date.

Q. Were you aware that the Tuscarora Nation intervened in a proceeding before the Federal Power Commission?

A. I was aware of that.

Q. And were you aware that the Tuscarora Nation as intervenor filed a memorandum in opposition to the taking of any Indian land on the ground that the taking was not authorized by law?

A. I couldn't say as to the memorandum you speak of.

Q. But you were aware that the Tuscarora Indians prior to issuance of the license were arguing that their lands could not be taken?

A. I was aware that the Tuscarora Indians were inter- [fol. 4934] venors and that they were against the taking of Indian lands.

[fol. 4935] Q. And this means then that all of the contracts, all of the construction work, all of the arrangements with the banks were either commenced or undertaken after the power authority was on notice that the Tuscarora Nation was objecting to the use of any of its land for reservoir purposes?

A. Under that premise, there isn't a public works project in the country that could proceed. Every public works project in the country proceeds against the objections of various people.

Q. Just answer my question. My question was whether you were on notice before you entered into your commitment.

A. To the extent that I said that I was aware that the Tuscarora Indians were against the taking of their land; we were on notice to that extent. We proceeded on the basis of a valid license.

Q. You proceeded on the assumption that the license would stand up; is that correct?

A. Why certainly.

Q. And knowing full well that there were procedures for judicial review.

A. I might say that the St. Lawrence Project is producing power, and there is still—

Q. The St. Lawrence Project is not relevant here. What we are finding out is whether the power authority went ahead on an assumption which so far has turned out to be [fol. 4936] erroneous, and the question was whether the power authority was on notice that it was taking a risk, and I believe your testimony is that it was on notice and that nevertheless it went ahead. Am I correct?

A. We proceeded with the project.

* * * * * * *

[fol. 4942] Cross examination.

By Mr. Hobbs:

. . . . . .

[fol. 4944] Q. As I understand the testimony so far, the transmission lines are being relocated in part on the Tuscarora reservation.

A. That is right.

Q. Those are existing transmission lines?

A. We are relocating transmission lines, two transmission lines. One is a 25-cycle line that ties in with Ontario Hydro across the river, and the other is a 60-cycle line that feeds the Stauffer Chemical Plant.

The existing lines are in the way of construction. They are directly in the way of construction of the Tuscarora Power Plant, and they are also in the path of our aggregate plant, which is rapidly nearing completion and which must furnish all of the concrete for the entire project.

Now, we are relocating those lines in order to clear the sites so that the contract work can continue without claims for delay.

Q. Is any other construction of the project works authorized by the Commission's order of January 30, 1958, being constructed at this time on the Indian reservation other than those relocations of transmission lines that you have referred to?

A. Oh, yes. We are doing clearing and have completed a considerable amount of the clearing in the area of the dikes. We are preparing to relocate the Fish Creek and [fol. 4945] Gill Creek in order to build the haul roads to construct the dikes.

Work is actively going ahead on this phase of the work, and it must go ahead in order to meet the schedules for the project.

Q. What is the schedule?

A. The schedule for the project as licensed provides for first power on February 10, 1961, and all of the various contracts for construction and the contracts for equipment are keyed into this schedule, and the entire schedule depends upon each unit proceeding in its order and fitting into the over-all pattern.

Q. Are you familiar with the estimated cost of this project?

A. I am.

Q. What is the estimated cost?

A. The estimated cost of this project with financing costs and interest during construction is $700,000,000.

Q. And without the financing cost?

A. Without the financing? The total expenditure for construction is estimated at, including engineering, administrative expenses and contingencies, is estimated at about $670,000,000.

Q. And has there been any financing to date?

A. Yes.

We sold on the basis of these estimates, why, we sold [fol. 4946] 100 million dollars worth of notes to commercial banks at 2 per cent.

Q. And do you know when those notes are due?

A. Yes, those are due on February 1, 1958, I believe—1959, I'm sorry.

Q. And can you tell me why the construction schedule was scheduled as it was?

A. There were a number of reasons why the construction schedule was scheduled as it was. First, we had a mandate to produce power and to produce it rapidly, that there was an emergency on the Niagara Frontier, collapse of the Schoellkopf plant created that emergency.

The Niagara Frontier is now depending upon power which they obtain from various sources, including the Ontario Hydro.

The Ontario Hydro commitments do not run to the time that we propose to produce first power here. That power can be withdrawn.

Secondly, this type of job involving the huge amount of money that is involved here has a tremendous amount of interest. The interest alone, even during construction, is a very substantial amount of money. The cost of carrying the job during construction is such that it requires the utmost of speed.

If you consider the value of this power to the Niagara Frontier, taking the difference between steam power and the power that we can produce here, it is worth $100,000 a day.

[fol. 4947] If you consider the interest per day at the end of this project, it is worth 70-odd thousand dollars a day, so that the urgency here, it is an extremely urgent project both from the standpoint of providing the Niagara Frontier with the power they sadly need and from the standpoint of building this at the cheapest possible rate and protecting the investment of the private investors.

We do not have public credit. We have to borrow money on the basis of the revenue we will receive from the project. Therefore, we must plan the project in such a way as to get revenue at the earliest possible time.

. . . . . .

[fol. 4949] Q. Are you familiar with Item 1 by reference, Senate Document 113, 84th Congress, Second Session? Have you seen that report?

A. Yes, I have seen this report.

Q. Can you tell me whether the Niagara Development set forth in that report was prepared prior to the Schoellkopf disaster, the rockslide on June 7, 1957?

A. Yes, this document was prepared prior to that time.

Q. And did that project contemplate utilizing the Schoellkopf plant in connection with additional facilities to be constructed in accordance with that report?

A. Would you repeat the question?

(The last question, as recorded, was read by the reporter.)

The Witness: Yes, this project was based upon the continuation of the use of the Schoellkopf plant.

By Mr. Hobbs:

Q. Do you know that the Bureau of the Federal Power Commission prepared a similar report prior to this Army report?

A. I recall they did, yes.

Q. Contemplating the continued use of the Schoellkopf plant?

A. That is my recollection.

Q. And do you know that both of those reports included [fol. 4950] reservoirs for pump-back storage?

A. That is right.

Q. I refer you to Item 2 by reference, page 6, where the reference is made to the Bureau of Power report with the storage reservoir 22,000 acre feet.

A. Yes, this report called for a storage reservoir, pump storage plant at the top of Niagara escarpment of 22,000 acre feet.

Q. With an area of about 850 acres?

A. That is right.

Q. I refer you to the paragraph on page 7. Would you mind reading that paragraph?

A. This is the first full paragraph on page 7:

"As a result of the disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this, 1,800,000 will constitute firm power on a 17-hour day basis. It is anticipated that in order to achieve this amount of firm capacity, pump storage and pumping generatoring facilities will be required.

"With an interconnection with the St. Lawrence Project the total firm capacity during a 17-hour day period would amount to 2 million kilowatts. The estimated cost of con- [fol. 4951] struction of the project as proposed by the Power Authority of the State of New York is $532,000,000."

Q. I show you Exhibit 191 and ask you if the project shown in part on pages 40 and 41, including the reservoir is the first project to your knowledge as of January 28, 1957, which contemplated a project with a total installed capacity of 2,190,000 kilowatts with 1,800,000 firm capacity?

A. This project contemplated 1,800,000 kilowatts of firm capacity and the installed capacity was two million, one hundred and some thousand kilowatts. It is in here. Maximum installed capacity, 2,190,000 kilowatts, dependable capacity, 1,800,000 kilowatts.

Q. To your knowledge, is that the first proposed project of that capacity?

A. As far as I know it is, yes, because this was based upon the use of the Schoellkopf waters.

Q. Do you know whether this enlarged reservoir and capacity was brought about as a result of the Schoellkopf

disaster on June 7, 1957, the change in the size of the project?

A. That contributed to the 60 thousand acre foot required capacity of the reservoir.

Q. Did the project of that size and capacity leave any water for use in any other project in the Niagara area?

A. No. This was based on the use of all of the water available to the United States under the Treaty of 1950.

[fol. 4952] Presiding Examiner: I believe, Mr. Hobbs, that the Schoellkopf plant was destroyed on June 7, 1956, and 1957.

Somebody on your staff said 1957. I think it was 1956.

The Witness: That is right, it was 1956.

By Mr. Hobbs:

Q. So your testimony is based on June 7, 1956?

A. That is right.

Mr. Hobbs: I thought that was rather recent, but I wasn't sure.

Presiding Examiner: If it was 1957 the statute was passed within a couple of months after that.

Mr. Hobbs: That is right.

By Mr. Hobbs:

Q. Are you familiar with the Schoellkopf plant prior to June 7, 1956?

A. In general terms.

Q. Do you recall whether it developed all of the head between the intake as proposed here and the Lewiston Powerhouse?

A. No. The Schoellkopf plant, as I recall it, developed 212 feet of head whereas we have—where there is available at the Lewiston plant 309 or 315 feet, I believe. The total drop between Lake Ontario and Lake Erie is 326 feet, and at Lewiston we are developing virtually that entire head whereby at the Schoellkopf plant, which was upstream and with rapids intervening, there was only 212 feet.

[fol. 4953] Q. Did the plans prepared prior to June 7, 1956, contemplate utilizing the tailwater from the Schoellkopf plant down to the approximate location of the Lewiston Power Plant?

A. That is right. That was definitely so in the Corps of Engineers' report, and I believe if my memory is correct, I believe that was in the Federal Power Commission's earlier report.

Q. So that in addition to using the additional water made available by the 1950 Treaty, the additional diversion, you would also utilize the same water that is going through the Schoellkopf plant?

A. There were plans for that, but I might say this: That the economic feasibility I do not think had ever been completely worked out, but there were definitely plans which would provide for the use of the tailwater from the Schoellkopf.

Q. So that the disaster of June 7, 1956, eliminated the problem of redevelopment at Niagara Falls caused by the existence of the Schoellkopf plant.

A. That is right.

* * * * * * *

[fol. 4955] Cross examination.

By Mr. Grossman:

Q. Colonel Chapin, I believe you stated yesterday that you could continue the financing of this project by using 30-thousand acre fields instead of a 60-thousand acre field, is that true?

A. We can continue the financing of the project on the basis—did you say acre what?

Q. Acre field.

A. Field?

Q. Fields, a 30-thousand acre field.

A. You mean 30 thousand acre feet?

Q. Feet, I'm sorry.

A. We can continue the financing of the project based upon a 30-thousand acre foot reservoir.

Q. And if you were to take alternate land, you could

still use all the water that you are allowed to by a treaty [fol. 4956] with Canada, is that correct?

A. If we were to take—what alternate land are you talking about?

Q. Well, you have various schemes showing land bounded by Colonial Village on the east, the railroad tracks, in that area, Lockport Road.

A. If it were practical to take that land, the reservoir would contain 60 thousand acre feet.

Q. Which would then utilize all the water—

A. That is right.

Q. —that you were allowed to by treaty, is that right?

A. That is correct.

Q. Colonel Chapin, are you going ahead with this construction on the assumption that you will eventually get Indian land?

A. We are. We have a license to continue.

We have a license to build this project and we are building the project pursuant to the license which we have.

Q. All of this equipment that you have ordered, these turbines, these generators, these pumps, these are all built to specification, is that true?

A. That is right. They are built pursuant to the license which we have.

Q. And the specifications that you have given to the manufacturers contemplate the use of Indian land?

[fol. 4957] A. That is right.

Q. If you were unable to get the Indian land temporarily, you would then build a smaller reservoir, is that true?

If you were unable to get the Indian land temporarily, you would go ahead with plans to build a smaller reservoir?

A. We haven't said that.

Q. I am asking you, would you?

A. If we are unable to get the Indian land permanently, and only in the event that we are unable to get the Indian land permanently, will we resort to the use of the smaller reservoir.

Q. You do not contemplate using any alternate land, though?

A. We do not contemplate using the alternate site. It is not feasible.

Q. So that making it—simple, isn't it the intention of the Power Authority to continue this construction exactly as they have with the hope that they will eventually get these Indian lands at a later date?

A. We have the Indian lands now. We are in there under court order, and we are proceeding with construction pursuant to our license and the orders of the Court.

Q. Pursuant to the Court orders, you have also got $2,000,000 on deposit with the Federal District Court in Buffalo, have you not?

[fol. 4958] A. That is right.

Q. And do you know what the purpose of that is?

Colonel, you are the general manager of the Power Authority, are you not?

A. I am the general manager of the Power Authority.

Q. Do you know what the $2,000,000 that has been placed on deposit with the Federal Court in Buffalo is for?

A. Yes. The $2,000,000 was placed on deposit in the Federal Court to pay for, to cover the payment for the property.

* * * * * * *

[fol. 4959] Q. Colonel, did you state yesterday that you do not consider it practical or feasible to use one of the alternate schemes that has been proposed here?

A. I did.

Q. So that the best site for the reservoir would be the Indian land, is that true?

A. Would be the—

Q. The inclusion.

A. The area which includes the Indian land.

Q. Colonel, Mr. Rich stated that engineering is a practical business. Do you agree with that statement?

A. Engineering is definitely a practical business.

Q. If an alternate scheme which does not include Indian land is not practical or feasible, would you contemplate [fol. 4960] using that alternate land?

A. If an alternate scheme is not practical or feasible we would not contemplate using it.

Q. So that actually the Power Authority in all likelihood would either build a smaller reservoir and not use these alternate lands in the town of Lewiston if they could not get the Indian land, is that true?

A. If we are finally barred from the use of the Indian land, we will resort to smaller reservoir.

• • • • • • •

[fol. 4963] Mr. Rosenman: I would like to insert in the record at this point the order of the District Court of the Western District of New York, about which Mr. Grossman asked the witness, and instead of reading it, I would like to give it to the stenographer so that he could include it in the record, which will state what the $2,000,000 are for.

Presiding Examiner: It will be inserted in the record at this point.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 7934

POWER AUTHORITY OF THE STATE OF NEW YORK, Plaintiff,

vs.

1383.55 ACRES OF LAND, reputedly owned by the Tuscarora Nation of Indians and certain members thereof; THE TUSCARORA NATION OF INDIANS, et al., Defendants.

ORDER

[fol. 4964] Thomas J. Moore, Jr., Niagara Falls, N. Y., Attorney for Plaintiff.

Arthur Lazarus, Jr., Washington, D. C. (Strasser, Spiegelberg, Fried & Frank, Washington, D. C.), Attorney for Defendants.

Stanley Grossman, Niagara Falls, N. Y., Attorney for certain individual defendants.

Motion by Plaintiff for immediate possession.

This court, by order of September 15, 1958, granted plaintiff's motion for immediate possession of part of the lands which are the subject of this action. The present motion is for immediate possession of the balance of the lands sought to be condemned in this action.

I hold expressly that this court has inherent and statutory power to grant immediate possession of lands which are the subject of this suit. In the exercise of that power I hold that on the motion before me for immediate possession of certain other lands not covered by the order of this court dated September 15, 1958, the plaintiff has shown that the public interest will be prejudiced by delay in granting immediate possession.

I therefore direct that the plaintiff have immediate possession of the balance of the lands which are the subject of this suit, not covered by the order of this court dated September 15, 1958, with the exception hereinafter noted; [fol. 4965] the lands covered by this order consist of approximately 1298 acres of the Tuscarora Indian Reservation and are more particularly shown on a map filed herein October 28, 1958, to which there is attached a certificate of J. P. Ottesen, Project Manager; Uhl, Hall and Rich, Consulting Engineers to Power Authority of the State of New York for the Niagara Power Project. There is excluded from the effect of this order certain portions of the general area, six in number, enclosed in red lines shown on said map, which lines indicate a distance not less than two hundred feet from any dwelling shown on said map, the intent being to exclude and except from immediate possession the dwellings shown and all areas within two hundred feet from any dwelling shown on said map.

The immediate possession herein directed is for the purpose of devoting the land described temporarily to the public use of necessary work required to be done in connection with the proposed reserveir and power project generally.

As a condition, the plaintiff is directed to deposit immediately with this court, and before entering into possession under this order, the sum of One Million Eight Hundred

Thousand Dollars ($1,800,000), to be applied to the payment of just compensation for the lands entered upon, as may be hereafter determined in this action, with interest from the date of entry on the lands so described, and the costs and expenses of this proceeding; the balance, if any, to be returned to the plaintiff. The fixing of the sum of [fol. 4966] One Million Eight Hundred Thousand Dollars ($1,800,000) to be deposited is not to be construed as any indication of what just compensation may be for the lands described.

In case the present condemnation proceedings should be dismissed, or no final determination of just compensation should be made, or the proceedings should be abandoned by the plaintiff, I direct that the money so deposited, so far as necessary, shall be applied to the payment of any damages which the defendants may have sustained by such entry upon and use of their property, and their costs and expenses, such damages to be ascertained by this court, or by a referee to be appointed for that purpose.

If the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendants judgment shall be entered against the plaintiff for the deficiency to be enforced and collected according to law, and the possession of the property shall be restored to the defendants.

It is hereby so ordered.

Harold P. Burke
Harold P. Burke
U. S. District Judge

Oct. 29, 1958.

Redirect examination.

By Mr. Rosenman:

[fol. 4967] Q. Will you look at the map on pages 40 and 41 of Exhibit 191?

Do you remember yesterday Mr. Lazarus was inquiring about the designation of the various thoroughfares which you used as boundaries of the words "open country" contained in that exhibit?

A. That is right.

Q. What are the names of the thoroughfares that you used?

A. I said that the Military Road was—

Q. Does that appear on the map?

A. That is right.

Q. And is it designated as Military Road?

A. That is correct.

Q. Will you state what the other boundary was, the southern boundary?

A. The southern boundary is the Saunders Settlement Road, which I stated connected with Witmer Road.

Q. And is Witmer Road designated?

A. That is right.

Q. And does the extension east of Military Road appear?

A. That is right.

Q. What is the other road you used as the northern boundary?

A. The northerly boundary is the Upper Mountain Road. [fol. 4968] Q. Does that appear on the map?

A. The road appears on the map.

Q. There is no designation for it?

A. That is right.

Q. Where does that road appear with respect to the reservoir?

A. Immediately to the north of the reservoir.

Q. There were some questions posed to you yesterday by Mr. Lazarus about your proceeding in spite of the threatened litigation by the Tuscarora Nation.

Do you recall that?

A. That is right.

Q. How long has your experience been with respect to projects, public projects?

A. Construction projects? I have been connected with construction since 1927.

Q. Do you know of any substantial public project which did not continue because of any threatened litigation?

A. I know of no project of any magnitude which has ever been constructed that there has not been litigation of some sort.

Q. What has been your experience with respect to the threatened litigation in connection with projects of this order of a public nature?

A. My experience has been that you must proceed on the
fol. 4969] basis of whether or not there is litigation, and that is the normal course; otherwise, no project would ever be constructed. The St. Lawrence Project to date would not even be started if threatened litigation were the determinant as to whether the project would go ahead.

Q. When the St. Lawrence Project was commenced, your testimony is that there were threats of litigation from what sources?

A. The St. Regis Indians. There were threats of litigation and there is still litigation.

Q. And the project is now completed and delivering power, is it not?

A. The project is completed and yesterday one billion kilowatt hours of energy had been delivered since it was started in July.

Q. Do you recall yesterday that Mr. Lazarus read to you from Item 6, the testimony of Major Garrett of the Corps of Engineers, the U. S. Corps of Engineers, to the effect that all of the land for the project then under consideration was owned by Niagara Mohawk, generally owned by Niagara Mohawk?

A. I recall.

Q. Will you state whether that project is the same project as we have under discussion here that has been licensed to you?

A. In some respects that project was different. As far
fol. 4970] as the location of the reservoir, it is the same, but the conduits were in a different location.

The conduits in that project ran directly to the Lewiston Powerhouse.

Q. They ran from the intake directly to the Lewiston Powerhouse?

A. That is right.

Q. As a matter of fact, even with that location, was Major Garrett correct?

A. No, he was not.

Q. With respect to the ownership by Niagara Mohawk?

Mr. Lazarus: I think the record will show that Major Garrett did not even answer the question.

The Witness: He was not correct.

Mr. Rosenman: What was the man's name?

Mr. Moore: Mr. Crook.

By Mr. Rosenman:

Q. Was Mr. Crook correct if he is the one that made that statement?

A. He was not correct.

Q. In other words, there was land even in that project which did not belong to the Niagara Mohawk?

A. A substantial amount of land.

Q. Now you have general knowledge of which of the lands in the project now licensed which you are construct-
[fol. 4971] ing belong to Niagara Mohawk, do you not?

A. I have.

Q. And what percentage of the lands which you have taken, including the reservoir site, belongs to Niagara Mohawk?

A. 42 per cent.

Q. And the rest belonged to other people before it was taken?

A. That is right.

Q. Have you made a computation in connection with the questions which Mr. Hobbs asked you this morning of the total interest which will be paid by the Authority which is estimated to be paid by the Authority during the construction period?

A. Yes, we have.

Net interest required during construction and six months thereafter, $98,940,000.

Q. What do you mean by net interest, Colonel?

A. Well, the net interest takes into account that we reinvest our funds after we obtain them, and of course, we put them out on time deposits or by the purchase of Government securities, and this is the net between those two figures.

[fol. 5020] Recross examination.

By Mr. Lazarus:

Q. Is it not possible to construct a reservoir of more than 22,000 acre-feet covering more than 850 acres and still not take an acre of Indian land, of Tuscarora Indian land?

A. Well, we have testified that we will have 30,000 acre-feet remaining if we do not take Tuscarora land.

Q. And that will cover approximately 1300 acres, is that correct?

A. That is right.

* * * * * * *

[fol. 5080] Henry S. Manley was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenman:

Q. Will you state your full name and address, Mr. Manley?

A. My name is Henry S. Manley, and my address is Strikersville, New York.

Q. Are you a member of the Bar of the State of New York?

A. I am.

Q. Any other bars?

A. Yes. I have been admitted to various Federal Bars, including the Supreme Court of the United States.

Q. Will you state what your experience has been in connection with Indian affairs in the State of New York?

[fol. 5081] A. Commencing in 1925, when I first went into the Attorney General's Office in the State of New York, the problems of the Indians which came to that office were assigned to me. In fact, there was at that time pending in the Supreme Court of the United States a case of People Ex Rel. Kennedy against Tyler which is reported in 269 U. S. and although that was already briefed and was as-

signed to a member of the preceding administration of the Attorney General's Office to argue in early 1925, I assisted him and came down here and was present when that was argued.

Subsequently, I participated in a number of litigations involving the Indians of the State of New York, wrote a great many opinions for the Attorney General's Office relative to them, advised various departments in connection with them, and over the years from 1925 down to the present time, matters relative to the Indians of New York State have been a very large part of my concern as a lawyer and as a historian.

Incidentally, perhaps it would be appropriate for me to mention that I have contributed some articles to historical research in connection with those Indians, including a small book on the subject of the Treaty of Fort Stanwix, which was held in 1784.

Q. What land did that treaty cover?

A. The Treaty of 1784 was a treaty between the United States and the Six Nations of New York and involved the [fol. 5082] entire State of New York and parts of other states.

Q. Have you testified before any Congressional committee on Indian Affairs as related to the State of New York?

A. Yes, I had occasion to testify in 1929. I think that was before the House Committee on Indian Affairs, and in 1930 before a special Senate Committee that was investigating Indians all over the United States, including those in the State of New York, and in 1948 in connection with what subsequently became the Criminal and Civil Jurisdictional Bill.

Q. Have you appeared in the Supreme Court in connection with litigation involving Indians in New York?

A. Yes.

After the Kennedy case in 1925, I had occasion to prosecute certiorari unsuccessfully from the Forness decision of the Second Court of Appeals, Second Circuit, and in 1946, I think it was, I argued the case of People Ex Rel. Ray. I may not have the title exactly right. I think it is in 296 United States.

Mr. Moore: Against Martin?

The Witness: That is right, People Ex Rel. Ray against Martin, I believe.

By Mr. Rosenman:

Q. Have you had occasion to conduct any research in the Buffalo Historical Society and in the Archives of the United States with respect to this reservation?

A. Yes, many times commencing back in 1931 and from [fol. 5083] then on down to the present year I have had occasion to research in both of those places and in other places relative to this reservation and the other reservations of New York State.

Q. I show you this map.

May I have the Examiner give this a number, please?

Mr. Lazarus: Are we outside of his qualifications now?

Mr. Rosenman: Yes.

Mr. Lazarus: I would like to ask some questions.

* * * * * * *

[fol. 5093] Mr. Lazarus: You previously testified that you did not have a college degree. That means you do not [fol. 5094] have any degree in history?

The Witness: That is right.

Mr. Lazarus: Any degree in economics?

The Witness: None.

Mr. Lazarus: Anthropology?

The Witness: None.

Mr. Lazarus: Have you had any special training in the academic field in historical research?

The Witness: I suppose your reference to the academic field was intended to preclude any experience I have had over the past 30 years or so, is that right?

Mr. Lazarus: I am trying to find out if at an accredited institution of learning you have ever taken any courses in history.

The Witness: The answer is no.

Mr. Lazarus: Or in research techniques?

The Witness: None.

Mr. Lazarus: Have you ever taken any courses relating to Indians, either anthropology or ethnology or archeology,

those courses that would in a formal way give the background of tribes.

The Witness: I have never had any such instruction in an institution of learning.

Mr. Lazarus: Do you belong to any professional historical societies?

[fol. 5095] The Witness: Yes, I belong to the New York State Historical Society, and two or three local ones.

Mr. Lazarus: Are those professional societies?

The Witness: The New York State Historical Society in recent years has tended to become somewhat professional.

Mr. Lazarus: What does it take to join?

The Witness: $10.00 a year and an interest in the work, I think.

Mr. Lazarus: So there are no specific professional qualifications?

The Witness: That, I think, is right.

Mr. Lazarus: Mr. Manley, did you prepare an affidavit dated June 4, 1958, sign and swear to it for use in the United States District Court for the Western District of New York?

The Witness: I did.

Mr. Lazarus: Is this your affidavit?

The Witness: That is it.

Mr. Lazarus: Your Honor, the decision of the District Court in the Western District of New York, to the best of my knowledge, is unreported. It is, however, printed in our petition for certiorari in the United States Supreme Court.

I call your attention to the fact that the last sentence in the next to last paragraph of the opinion of the District Judge reads as follows:

[fol. 5096] "Plaintiff's motion that the affidavit of Henry S. Manley be stricken as an affidavit and considered by the Court as an additional brief on behalf of Defendants is granted."

I also call your attention to the decision of the Second Circuit in the Tuscarora case. The Power Authority appealed the decision of Judge Morgan striking the Manley affidavit, and one paragraph from the end of the Second Circuit decision appearing on 257 Fed. Seed. 893, we have the following statement:

"The cross appeal with reference to the affidavit of Henry S. Manley is affirmed. It is sufficient that the material therein contained be received within the limitations fixed by the Court below."

That means it was received only as a brief.

Your Honor, at this point I move that the testimony of the witness Manley be excluded and I so move on two grounds. The first ground is that what he has to say is not the subject of expert testimony except in one minor respect and I would not object to his appearing for that purpose.

If he wishes to identify documents that he himself has located and say that those are the documents that he did locate, I would have no objection to his testifying, but that is not the real purpose for which he is here. He is here to testify with respect to those documents, to say what is in them, and as Judge Rosenman stated, to give us a historical [fol. 5097] account of the creation of the Tuscarora reservation.

Your Honor, the documents speak for themselves. They are the best evidence. There is nothing that Mr. Manley can say that can in any way contribute or add or take away from those documents, and it is within the province of you as Examiner and the Commission and the Court to look at the documents without any expert testimony.

These are just not materials which are the subject of expert testimony.

Secondly, even if historical material of this nature were the subject of expert testimony, Mr. Manley is not qualified to do the job. Mr. Manley has had no training as a historian, has had no training whatsoever in any institution that is accredited with respect to Indians or Indian affairs in any way, either from the cultural point of view, or the historical point of view, or the ethnographic point of view.

He is therefore not competent to testify on the subject for which he was called even if that were a subject that was available for expert testimony.

Mr. Manley, Your Honor, is a lawyer. He is nothing more than a lawyer and nothing less. I have the utmost respect for him as a lawyer, but his background is that of taking one position, which is the biased position of the State of New

York Attorney General's Office, which has been rejected by the Courts most recently in this case.

[fol. 5098] The subject of Indian law is, of course, not the subject of expert testimony. The laws of the United States speak for themselves. They are interpreted by the Commission and by the Courts. They are not interpreted by experts who are supposed to talk about facts.

If Mr. Manley is qualified to talk about anything, he is qualified to talk only about the law. And, of course, that is not the subject of expert testimony.

As I have said, he is not a historian. He has had no training as a historian. He is therefore not a qualified expert witness. The way the record shapes up now, we might just as well have Mr. Manley asking the questions and Judge Rosenman answering them, because their qualifications are roughly the same in this respect.

That concludes my motion. There are two grounds for excluding the testimony of this witness.

* * * * * * *

[fol. 5100] Presiding Examiner: In regard to the motion, at the time this witness attended law school, there were no requirements that he have as a prerequisite to entrance to a law school, that he have either an AB degree or its equivalent. At the time he graduated from Law School, there were [fol. 5101] many lawyers, and good ones, who had been admitted to the Bar in their various states only by having studied law in some lawyer's office. I can think of no better training in historical research than having been a member, an active member, of the Bar of the United States or of the State of New York, or any of the other states.

This Examiner does some historical research. This Examiner does some genealogical research. This Examiner belongs to some state historical societies. He knows of his own knowledge that his training in legal research has been of material benefit to him in doing historical and genealogical research. The motion is overruled and you may make your objections then to individual questions.

* * * * * * *

[fol. 5109] By Mr. Rosenman:

Q. Will you turn to Exhibit 232-F on page 11 of Exhibit 232 for identification. This was taken, was it not, from the National Archives?

A. That is right.

Q. Who was Saccorosa mentioned in the document?

A. He was a chief of the Tuscaroras who was present in Washington at the date mentioned.

[fol. 5110] Q. And who was the Acting Secretary of the Department of War?

A. Sam Dexter.

Q. And does the title to this document indicate the date and so forth, and the page of the National Archives?

A. It does.

Mr. Rosenman: Perhaps if I give the Examiner time to read this, as we go along, it will be more intelligible to you.

Presiding Examiner: All right, I have read it.

By Mr. Rosenman:

Q. At this time, 1801, the Tuscaroras were living, were they not, on parcels A and B of Exhibit 231 for identification?

A. They were.

Q. And when they say "We are 300 and suppose ourselves to be the lawful owners of this property"—

Mr. Lazarus: Objection, Your Honor. We have no foundation for this testimony.

Mr. Rosenman: Which testimony?

Mr. Lazarus: The testimony of the witness.

Mr. Rosenman: There are later documents here, Your Honor, to show that they were at this time occupying "A" and "B". There never has been any question about it. It has been conceded time and again in the various courts. And besides, the documents will later show it.

Will you take this subject to connection?

[fol. 5111] Mr. Lazarus: My point here is, Your Honor, that the documents are going to speak for themselves. It is absolutely true that the Tuscaroras at the time, 1801, the document refers to, at that time they were living on parcels

A and B, if not other places too. The point I am trying to get at, and perhaps my objection was not phrased quite correctly, is that the documents here all speak for themselves, there is nothing that Mr. Manley can add or detract from what is in the documents. This is a matter of historical record, and the documents will bring it out. Mr. Manley was not there, he cannot tell us whether they were or were not there.

Maybe the objection goes to the competence of the witness to testify on that subject and to the fact that no foundation has yet been laid to it.

Presiding Examiner: There is already evidence before this court from the Indians themselves that they were living at that time on tracts A and B. As I recall, one or more of the chiefs testified to that in earlier examinations.

Mr. Rosenman: There has never been any question of it, and Mr. Lazarus just stated that is the fact. The documents with respect to that will be introduced later.

Mr. Lazarus: I will withdraw my objection.

[fol. 5112] By Mr. Rosenman:

Q. When they say, "We are 300 and suppose ourselves to be the lawful owners of this property," they were talking about their property in North Carolina, were they not?

A. Yes.

Q. Now, will you turn to page 13 of Exhibit 232, to Exhibit No. 232-G. That, too, is taken from the archives, is it not?

A. It is.

Presiding Examiner: Proceed.

By Mr. Rosenman:

Q. Will you turn to page 15, Exhibit No. 232-H. Is this also taken from the archives?

A. It is.

Q. In accordance with the title of the document?

A. That is right.

Q. These are excerpts, are they not?

A. Yes. Each excerpt is complete in itself, but there were

a number of speeches and transactions that have been omitted from the complete story in the archives.

Q. Now will you turn to page 17, which is Exhibit No. 232-I. Who was Henry Dearborn at this time?

A. He was Secretary of War.

Q. And who was William R. Davie?

A. He was a gentleman in North Carolina, I think a dis-[fol. 5113] tinguished citizen of that state, but I do not know much about him.

Q. And this was a letter sent to him?

A. That is right.

Mr. Rosenman: I call the Examiner's particular attention to the last paragraph on page 17:

"Their object is to procure money from the State of North Carolina for the session or sale of their right to the before-mentioned tract, and with it to purchase lands adjacent to those on which they now reside."

By Mr. Rosenman:

Q. Now will you turn to page 19, which is Exhibit No. 232-J.

Presiding Examiner: This is off the record.

(Discussion off the record.)

Presiding Examiner: Back on the record.

By Mr. Rosenman:

Q. Will you turn to page 19, Mr. Manley. Henry Dearborn was still Secretary of War, was he not?

A. That is right.

Q. And this is taken from the archives, is it not?

A. It is.

Mr. Rosenman: I call the Examiner's particular attention to the third paragraph on that page:

[fol. 5114] "The President cannot interfere in the business between your Nation and the State of North Carolina in any other way than he has already done; but he will continue to afford you such aid as is in his power, he cannot pay, however, any large sums of money."

By Mr. Rosenman:

Q. Now will you turn to page 21, Exhibit 232-K. Who is Longboard?

A. He seems to have been another chief of the Tuscaroras.

Q. And the date of this and the caption is taken from the National Archives, is that right?

A. That is right.

Mr. Rosenman: I call Your Honor's attention to paragraph no. 3:

"The Tuscarora's wish from the avails of the land sold in North Carolina to purchase about five miles square of the Holland Company, joining to, and running parallel with the lands now possessed and occupied by the Tuscarora Nation. To effect this object, they wish you, Brother, to deposit the money which will be sent you by the Agent for the Tuscaroras in North Carolina, in the Bank of the United States, and have it safely kept until a bargain can be made for the lands belonging to said company."

[fol. 5115] By Mr. Rosenman:

Q. Then the statement on page 22, beginning in that part entitled, "The Reply of the Secretary of War," that was Mr. Dearborn, was it not?

A. That is right.

Q. "I will receive the money which may be transmitted by your agent in North Carolina . . ."

This reply was being addressed to Longboard, was it not?

A. It was.

Q. " . . . and have it safely lodged in the Bank, where it will rest until it can be applied to the object contemplated by your; to effect which I will immediately write to the Agent for the Holland Company, and learn from him whether he is authorized and disposed to sell any of the land belonging to the concerned, and the quantity and rate at which it may be purchased, the result of which I will forward to the Agent, who may be appointed by your Nation to be communicated to you."

Now will you turn to page 25, Exhibit 232-L. To whom is this letter addressed?

A. That letter is from Secretary of War Dearborn to Joseph Ellicott, who was the agent of the Holland Company with an office at Batavia, New York.

Q. And this was sent by the Secretary of War, Henry [fol. 5116] Dearborn?

A. That is right.

Q. Then page 27, Exhibit No. 232-M: Who was Paul Busti, mentioned in the caption of this letter?

A. He was a superior officer in the Holland Company with an office at Philadelphia, Pennsylvania.

Q. And is this taken from the National Archives?

A. Yes.

Q. At this time, according to this letter, the Tuscaroras had a fund amounting to upward of $15,000, according to this letter; is that correct?

A. Yes, this letter, and other evidences contemporaneously show that they did have such a fund.

Q. Do these documents indicate these were the proceeds of the sale of North Carolina lands?

A. That is right.

Q. Do the documents show where this money was on deposit?

A. It was not on deposit. It was at the time of this letter in the form of notes, and other evidence of indebtedness, that had not yet been collected into the form of specie.

Q. That also is located in the letter, is it not?

A. That is right.

Mr. Lazarus: I do not think he fully answered the question. You asked where it was.

The Witness: I do not know—

[fol. 5117] By Mr. Rosenman:

Q. Do you know where the notes—

A. I do not know where the notes were at that time, but the correspondence would seem to indicate they were in the hands of Mr. Davie, or some other representative in North Carolina.

Q. Who was Davie?

A. Davie was the man appointed by the Secretary of War to look after the transaction of collecting the money in North Carolina on behalf of the Tuscaroras.

[fol. 5118] Q. Now turning to page 29, who was Jeremiah Slade?

A. He was another person in North Carolina whom the Secretary of War Dearborn used as a correspondent relative to this matter.

Mr. Rosenman: I call Your Honor's attention to the last paragraph.

By Mr. Rosenman:

Q. This, too, was taken from the National Archives?

A. Yes, all these documents we have dealt with thus far are from that source.

Mr. Rosenman: I call Your Honor's particular attention to the last paragraph, that it is quite obvious, or we shall argue, that the Secretary of War did not want to buy the new land unless he was assured that the old land was going to be paid for and the money in hand.

By Mr. Rosenman:

Q. Proceeding to page 31, Exhibit 232-O, this was taken from where?

A. This is from the files of manuscripts in the possession of the Buffalo Historical Society.

Q. Who was Erastus Granger?

A. Erastus Granger was a lawyer in western New York in the early 1800's, and he was appointed by the War Department as Indian Agent for the Indians in western New York

Q. What was his relationship to this transaction?

[fol. 5119] A. As Indian Agent he had occasion to write this letter to Secretary of War Dearborn.

Q. Now the tract of land that he was negotiating with the Holland Company is designated on 231, on Exhibit 231, as part C, is it not?

A. Yes, this letter reports the success of negotiation with the Holland Land Company for the acquisition of the land which on Exhibit 231 is marked C.

Mr. Rosenman: I call the Examiner's attention to the paragraph:

"The lots adjoining the Tuscarora Reservation on the north are selling from four to five dollars per acre."

And we point out that that is the land north of parcels A and B, where they were then living.

I also call the Examiner's attention to the last sentence of the letter:

"The Indians are willing the land should be held in trust by the Secretary of War for the time being for their benefit."

By Mr. Rosenman:

Q. On page 33, which is Exhibit No. 232-P, where is the original of this?

A. The original is presumably a manuscript journal which is in the possession of the Buffalo Historical Society; but the Buffalo Historical Society published that and other [fol. 5120] documents quite a number of years ago, and so in printed form the original can be found in Volume 6 of the publications of the Buffalo Historical Society at page 221.

Q. Who is Gerard T. Hopkins?

A. He was a Quaker who seems to have been acting as a missionary to the Indians in western New York.

Mr. Rosenman: I want to call your Honor's attention to this statement—I will read the preceding sentence:

"He—that is Saccarissa—"he has come for the purpose of being assisted by the agent in investing $15,000 in the purchase of land from the Holland Land Company. They have greatly declined hunting, and are becoming agriculturists. The Tuscarora Indians were removed from North Carolina many years ago, and were received into the then Five Nations, or Iroquois Indians, who gave them a small tract of country, which they now think wants enlarging."

By Mr. Rosenman:

Q. On page 35, Exhibit 232-Q, you have told us, I believe, who Erastus Granger was, have you not?

A. I did.

Mr. Rosenman: This indicates, Mr. Examiner, that the Secretary of War, as he states, was to pay for this land as he got the money from the sale of the North Carolina land.

By Mr. Rosenman:

[fol. 5121] Q. This was a letter from the Secretary of War to Mr. Granger, was it not?

A. It was.

Q. And this came also from the National Archives?

A. That is right.

Q. Now on page 37, which is Exhibit 232-R, this was from the Secretary of War to Mr. Busti. When was the deed actually conveyed to the Tuscaroras? It was two years after this, was it not?

A. Which deed do you refer to now?

Q. The deed from Dearborn to the Tuscaroras.

A. That was later after the payments had been completed.

Q. Yes. Now on page 39, Exhibit 232-S, will you state what this is?

A. Page 39 and that document which commences on that page, is the deed from the Holland Land Company to Secretary of War Dearborn in trust for the Tuscarora Indians of the land which on Exhibit 231 is designated by the letter C.

Q. And this is recorded, is it not, in the Niagara County Clerk's office?

A. It is.

Mr. Rosenman: When the Examiner has had a chance to read this, I want to call your attention to certain parts of it and I assume that—

Your Honor will note on the bottom of page 39 this pur[fol. 5122]chase price was to be paid with a certain amount down and the balance in two installments. Then I call Your Honor's attention to the fact, as appears on page 40, "... that the payment of the said two last-mentioned sums of money with interest be secured by a mortgage of the said lands to be executed by the said Henry Dearborn."

By Mr. Rosenman:

Q. Mr. Manley, was such a mortgage executed?

A. Yes.

Q. Tell us about it, will you?

A. I have never seen the mortgage. It seems not to have been put on record. But I have seen several contemporaneous letters that refer to it and about the credit of the installments as they were received on that mortgage. It seems that the mortgage was retained in the possession of Mr. Joseph Ellicott at Batavia for the Holland Land Company, and as Secretary of War Dearborn received remittances from North Carolina for the account of the Tuscarora Indians he sent them to Mr. Ellicott who credited them upon the mortgage.

Q. The mortgage was never recorded?

A. I think that is right.

[fol. 5123] Q. Then on page 42, the language of conveyance seems to be as follows:

"... unto the said Henry Dearborn and to his heirs and assigns to the only proper use of the said Henry Dearborn, his heirs and assigns forever in trust to and for the only proper use, benefit and behalf of them the said Tuscarora Nation of Indians and their assigns forever, and in Trust that he, the said Henry Dearborn and his heirs grant and convey the same in fee simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct and appoint."

Now, on page 45, Mr. Manley, Exhibit 232 T; this again is a letter from the Secretary of War to the same Mr. Granger, and where was this taken from?

A. This was from the National Archives.

Q. And this apparently was written after the deed from the Secretary of War to the Tuscarora Nation, which comes on the next page, is that right?

A. I believe the two documents were written on the same day. Yes—at least they bear the same date, January 2, 1809.

Q. The same date as Exhibit 232 U on page 47, is that right?

A. That is right.

[fol. 5124] Mr. Rosenman: I call the Examiner's attention to the last paragraph:

"It would be well for you to aid the Nation in a petition to the legislature of the State of New York to hold their lands in a national capacity."

We shall later point out that this is the way they obtained their exemption from taxes on Parcel C, by petition to the legislature of the State of New York, and it was here being suggested by the Secretary of War that they proceed to do that.

By Mr. Rosenman:

Q. Now, turning to page 47, to Exhibit 232-U, what is this?

A. This is a deed from Henry Dearborn, Secretary of War, to the Tuscarora Nation of Indians.

Q. And this is taken from the recorded deed?

A. In the Niagara County Clerk's Office.

Q. And it refers, does it not, to Parcel C, 4329 acres?

A. That is right.

Mr. Rosenman: I call the Examiner's attention to the fact that the land which the Power Authority has condemned comes from Parcel C and is represented on 231 by this shaded portion of Parcel C.

By Mr. Rosenman:

[fol. 5125] Q. Now, this was the deed by which the Secretary of War, having received payment from North Carolina, paid the Holland Land Company and then conveyed the land, Parcel C, to the Tuscarora Nation; is that correct?

A. That is right, he held it in trust during the period while the payments were in process, and as soon as the payments were completed, he conveyed the land to the Tuscarora Nation.

Q. This was a deed in fee simple, was it not?

A. Yes, it contains the usual recitals of a deed in fee simple.

Mr. Lazarus: I move the answer be stricken, Your Honor. It is a conclusion of law. The deed speaks for itself.

Mr. Hobbs: Mr. Examiner, assuming this is a conclusion of law, this is a qualified witness to reach such conclusion.

Mr. Lazarus: We went through that before, Mr. Hobbs. He is not qualified as a lawyer here; he is qualified as a historian here, theoretically.

Mr. Rosenman: He is qualified in all capacities, Mr. Examiner.

Presiding Examiner: He said that in his opinion that it was, and then he said that the deed contained the usual provisions of those contained in fee simple deeds at that time.

Mr. Lazarus: I have one further inquiry. Have you finished ruling on my objection?

Presiding Examiner: Objection overruled.

[fol. 5126] Mr. Lazarus: Then I have one further question. When I asked Judge Rosenman at the beginning of this witness' testimony, he stated that he was going to identify documents, describe the documents, and give us an historical account. Do I now understand that this witness is going to testify here with respect to the law? If that is the case, I would like it on the record.

Mr. Rosenman: I think insofar as the questions relate to questions of law, if the Examiner permits them, as I understand his ruling to be, that is what he will testify to.

Presiding Examiner: What the Examiner had on his mind was this: In going back into my law school days, if I remember the courses in real property tort; deeds about this period of time did not specifically say that they were conveyed in fee simple, but they used a certain language which signified that the title was being conveyed in fee simple. And it was with that thought in mind that I overruled your objection to the witness testifying this was a deed in fee simple.

Now, if he had said that it was a deed in fee simple, without the qualifying words that contained the language, then the objection, I think, would have been well taken.

Mr. Lazarus: Well, my point of inquiry now is, I was not going to argue with your ruling, other than the way I have been, in reserving the right to move to strike later,

but I am now at a broader question, which is whether this [fol. 5127] witness is deemed by you to be competent to testify on matters of law, because I was addressing my motion before to what Judge Rosenman said the witness was going to testify to, which I then understood to be history.

Now we have the question of whether this witness is going to testify as to matters of law, in which case I might have some other voir dire to ask him. But I think that it is quite obvious—you can sit down for a minute, Mr. Hobbs—it is quite obvious that matters of American law are not the subjects of expert testimony by a witness.

The law of the United States is found in the cases in the statute books, et cetera, and it is for the Commission and for the courts to decide the law. We do not have witnesses to tell us what the law is. This is the rule in every proceeding that has ever taken place in any administrative agency, as well as any court. You have witnesses who testify to facts; they do not testify to law.

If they are expert witnesses, maybe they give us an expert opinion on the facts: They still do not testify to what is the law of the United States.

[fol. 5128] Presiding Examiner: Mr. Lazarus, I think the exhibits speak for themselves, and what the intent of the parties were is reflected by what they wrote in the exhibits.

Mr. Lazarus: Now is he deemed qualified to answer questions with respect to the law?

. . . . . .

Presiding Examiner: I think the witness can testify whether or not he has an opinion. As to whether or not the Commission will follow his opinion, or whether they will draw their own conclusions from the documents is [fol. 5129] something that I do not know. But I think he can testify whether or not he has an opinion, based upon his experience as a historical researcher.

. . . . . .

[fol. 5130] By Mr. Rosenman:

Q. Will you proceed to page 53, Mr. Manley. Where were these excerpts taken from?

A. Those are excerpts from the Journal of the Assembly of the State of New York in 1821.

Q. In other words, were the Tuscaroras being charged with taxes on this land between 1809 and 1821?

A. That is what these excerpts show. Incidentally, it is what the petitions referred to, which I have seen, also show.

Q. And on page 55, is there reprinted the statute which exempts parcel C from taxes?

A. Yes.

Q. Do you know whether or not the Tuscaroras ever paid taxes on parcels A and B?

A. The petition that they submitted to the assembly in 1821 said that they were not being called upon to pay any taxes on parcels A and B, but that they were being called upon to pay taxes on parcel C.

Q. Do you have the actual petition?

A. I haven't it here, although, of course, the original is in the Manuscript Division of the State library at Albany, [fol. 5131] New York. It is a very delicate document, inasmuch as it went through the capitol fire of 1911.

Q. Have you read it?

A. Yes.

Q. Do you have a copy of it here in Washington?

A. No, I have only so much of it as I put into my affidavit of June 4, 1958, at page 14.

Q. Can you tell us, by refreshing your recollection, what that petition contains?

A. I can.

Q. Will you do so, please?

A. The petition which was referred to in the journal entry of January 23, 1821, was a petition by the chiefs of the Tuscarora tribe of Indians. And the original copy of it, which I saw, was signed by David Cusick and other chiefs, and the handwriting of the petition appears to be identical with the signature of David Cusick. So I assume that it is in his writing. It was also signed by marks by Sacharissa and two other chiefs, and all four designated in the petition as chiefs.

The Tuscaroras said they were a small group, not more than 250 souls, and that they received no annuities from the United States or the State. They said they had received money from their North Carolina lands and had expended it—and this is a direct quote from the petition—"for lands adjoining our present reservation." They said the assessors

[fol. 5132] of the town of Lewiston had been assessing this deeded land for the last several years. The Tuscaroras petitioned the legislature to relieve them from this taxation and they asserted two grounds:

First, they said that they were, in their words, an independent nation and that none of their lands could be taxed; and, second, they said that if such taxation was within the power of the State it should be relieved in their case.

* * * * * * *

[fol. 5134] HENRY S. MANLEY resumed the stand and testified further as follows:

Direct examination—resumed.

By Mr. Rosenman:

Q. This morning, Mr. Manley, you mentioned some document which you had read which showed that the mortgage which was mentioned in one of the documents to guarantee the purchase price of the two last installments was in Batavia, do you recall that?

A. I do.

Q. And during the noon recess, did you go to the Archives [fol. 5135] and get a photostatic copy of what you were referring to?

A. I did.

Q And is this it, which I show you?

A. That document is a negative photostat copy of the document in question.

Mr. Rosenman: May I ask that it be read into the record? We do not have copies for distribution and it is a very short statement.

Presiding Examiner: You may read it into the record, Judge.

By Mr. Rosenman:

Q. Will you read it?

A. The document reads as follows:

"Received this 30th of October, 1805, from William Davy, Esquire, $795 paid to me by the order of the Honorable Henry Dearborn, Esquire, on account of the second installment due by the Tuscarora Indians for certain lands con

veyed in trust to the said Honorable Henry Dearborn by the Holland Land Company, which sum I engage to have endorsed on the mortgage by Joseph Ellicott, in whose hands the mortgage remains at Batavia, Genesee County, State of New York. Signature, Paul Busty, General Agent of the Holland Land Company."

And below, at the left, the figures "$795."

Q. Do you know who William Davy was?

[fol. 5136] A. Yes, he was the same gentleman in North Carolina who has been referred to who seems to have acted at the request, or by appointment from the Secretary of War to aid the Tuscaroras in collecting the money that was due them in New York.

Q. And did this money go directly from the man in North Carolina to the Holland Land Company?

A. That is what that receipt shows.

Q. It was not paid to Dearborn and then paid over?

A. That is right.

* * * * * * *

[fol. 5142]

AGREEMENT ENTERED INTO BETWEEN ROBERT MORRIS AND THE SENECA INDIANS AT BIG TREE IN 1797 (N. Y. LEG., DOC. No. 51, 1889, Pp. 131-134).

This indenture, made the fifteenth day of September in the year of our Lord one thousand seven hundred and ninety-seven, between the sachems, chiefs and warriors of the Seneka nation of Indians of the first part, and Robert Morris of the city of Philadelphia, esquire, of the second part:

Whereas, The Commonwealth of Massachusetts have granted, bargained and sold unto the said Robert Morris, his heirs and assigns forever, the preemptive right, and all other, the right, title and interest which the said Commonwealth had to all that tract of land hereinafter particularly mentioned, being part of a tract of land lying within the State of New York, the right of the preemption of the soil whereof, from the native Indians, was ceded and granted by the said State of New York to the said Commonwealth; and

Whereas, At a treaty held under the authority of the United States, with the said Seneka Nation of Indians at Genesee, in the County of Ontario and State of New York, on the day of the date of these presents, and on sundry days immediately prior thereto, by the honorable, Jeremiah Wadsworth, esquire, a commissioner appointed by the President of the United States to hold the same, in pursuance of the Constitution and the act of the Congress of the United [fol. 5143] States, in such case made and provided, it was agreed, in the presence and with the approbation of the said commissioner, by the sachems, chiefs and warriors of the said Nation of Indians, for themselves and in behalf of their Nation, to sell to the said Robert Morris and to his heirs and assigns forever, all their right to all that tract of land above recited, and hereinafter particularly specified, for the sum of one hundred thousand dollars, to be by the said Robert Morris vested in the stock of the bank of the United States, and held in the name of the President of the United States, for the use and behoof of said Nation of Indians, the said agreement and sale being also made in the presence and with the approbation of, the honorable William Shepherd, esquire, the superintendent appointed for such purpose, in pursuance of a resolve of the general court of the Commonwealth of Massachusetts, passed the eleventh day of March in the year of our Lord one thousand seven hundred and ninety-one.

Now, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises above recited, and for divers other good and valuable considerations them thereunto moving have granted, bargained, sold, aliened, released, enfeoffed and confirmed, and by these presents to grant, bargain, sell, alien, release, enfeoff and confirm, unto the said party of the second part, his heirs and assigns forever, all that certain tract of land [fol. 5144] except as hereinafter excepted, lying within the county of Ontario and State of New York, being part of a tract of land, the right of preemption whereof was ceded by the State of New York to the Commonwealth of Massachusetts by deed of cession executed at Hartford, on the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty-six, being all such parts

thereof as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham, and bounded as follows, to wit: easterly by the land confirmed to Liver Phelps and Nathaniel Gorham by the Legislature of the Commonwealth of Massachusetts, by an act passed the twenty-first day of November in the year of our Lord one thousand seven hundred and eighty-eight; southerly by the north boundary line of the State of Pennsylvania; westerly partly by a tract of land, part of the land ceded by the State of Massachusetts to the United States, and by them sold to Pennsylvania, being a right-angled triangle, whose hypothenuse is in or along the shore of Lake Erie; partly by Lake Erie from the northern point of that triangle to the southern bounds of a tract of land one mile in width, lying on and along the east side of the Strait of Niagara, and partly by the said tract to Lake Ontario; and on the north by the boundary-line between the United States and the King of Great Britain; excepting nevertheless and always reserving out of this grant and conveyance, all such pieces or parcels [fol. 5145] of the aforesaid tract, and such privileges thereunto belonging, as are next hereinafter particularly mentioned, which said pieces or parcels of land so excepted are, by the parties to these presents, clearly and fully understood to remain the property of the said parties of the first part, in as full and ample manner as if these presents had not been executed; that is to say, excepting and reserving to them, the said parties of the first part, and their nation, one piece or parcel of the aforesaid tract, at Canawagus, of two square miles to be laid out in such manner, as to include the village extending in breadth one mile along the river; one other piece or parcel of two square miles at Little Beard's town, extending one mile along the river, to be laid off in such manner as to include the village; one other tract of two square miles at Squawky Hill, to be laid off as follows, to wit: one square mile to be laid off along the river, in such manner as to include the village, the other directly west thereof and contiguous thereto; one other piece or parcel at Gardeau, beginning at the mouth of Steep Hill Creek, thence due east until it strikes the old path, thence south until a due west line will intersect with certain steep rocks on the west side of Genessee River, then ex-

tending due west, due north and due east until it strikes the first mentioned bound, enclosing as much land on the west side as on the east side of the river. One other piece or parcel at Kaounadeau, extending in length eight miles along [fol. 5146] the river, and two miles in breadth. One other piece or parcel at Cattaraugus, beginning at the mouth of the Eighteen mile or Koghquaugu Creek, thence a line or lines to be drawn parallel to Lake Erie at the distance of one mile from the Lake to the mouth of Cattaraugus Creek, thence a line or lines extending twelve miles up the north side of said creek at the distance of one mile therefrom; thence a direct line to the said creek; thence down the said creek to Lake Erie; thence along the Lake to the first mentioned creek, and thence to the place of beginning. Also one other piece at Cataraugos, beginning at the shore of Lake Erie on the south side of Cataraugos Creek, at the distance of one mile from the mouth thereof; thence running one mile from the lake; thence on a line parallel thereto to a point within one mile from the Connondauweyea Creek; thence up the said Creek one mile on a line parallel thereto; thence on a direct line to the said creek; thence down the same to Lake Erie; thence along the Lake to the place of beginning. Also one other piece or parcel of forty-two square miles at or near the Allegenny River. Also two hundred square miles to be laid off partly at the Buffalo and partly at the Taunawanta Creeks. Also, excepting and reserving to them, the said parties of the first part, and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed. And it is hereby understood by and between the parties to these [fol. 5147] presents, that all such pieces or parcels of land as are hereby reserved, and are not particularly described as to the manner in which the same are to be laid off shall be laid off in such manner as shall be determined by the sachems and chiefs residing at or near the respective villages where such reservations are made, a particular note whereof to be endorsed on the back of this deed and recorded therewith, together with all and singular the rights, privileges, hereditaments, and appurtenances thereunto belonging or in anywise appertaining. And all the estate, right title and interest, whatsoever, of them, the said parties

of the first part, and their nation of, in and to, the said tract of land above described, except as is above excepted, to have and to hold all and singular the said granted premises, with the appurtenances to the said party of the second part, his heirs and assigns, to his and their proper use, benefit and behoof forever.

Concluded September 15, 1797.

* * * * * * *

[fol. 5152] Q. What is a preemptive right insofar as Indians are concerned?

* * * * * * *

[fol. 5153] Q. Go ahead, Mr. Manley.

A. I understand I am permitted to summarize what was held as in the nature of preemptive rights.

What the courts have held as to those is that the sovereign, in this case the state, had the first right to acquire the Indian lands. The Indians, who were found in possession in the lands when they were discovered by white people, had merely a possessory right according to the Supreme Court of the United States, and the sovereign had a right which it could exert either for itself or assign to others to exert, the exclusive right to buy that land from the Indians or take possession of that land when the Indians surrender that possession.

That is what was called the preemptive right, meaning the first right of purchase.

Q. Was there a dispute between the State of Massachusetts and the State of New York as to who owned these preemptive rights to these lands in all of Western New York, including Niagara County?

A. Yes.

The State of Massachusetts claimed that under the charter given to the Colony of Massachusetts, it had rights extending a considerable distance west, including all of Western New York.

Q. That would include these parcels A, B, and C, would it not?

[fol. 5154] A. Yes, they claimed that they had the preemptive right as to all of Western New York and also, of course, the right of governing it.

Q. And also what?

A. And also the right of governing it.

Q. How many acres were involved, or how many miles?

A. We know that there were millions of acres.

Q. And did New York claim the same?

A. Yes, New York claimed it, under the Duke of York's Charter.

Q. Did there come a time when New York and Massachusetts made an agreement between them with respect to this land?

A. That was the Hartford compact or Hartford compromise of 1786.

Q. And briefly, what was the compromise? What was the agreement?

A. The compromise was—

Mr. Lazarus: I object, Your Honor. That is a matter of public record, again. This witness cannot tell us what is in documents. The documents tell us the story.

By Mr. Rosenman:

Q. You have read it, have you not?

A. Yes.

Q. And has it been the subject of much historical writing and research?

[fol. 5155] A. It is not only of great interest to all historians in Western New York—

Mr. Lazarus: I have an objection.

The Witness: —but it is a basic document in land titles in Western New York.

I, of course, am thoroughly familiar with it from both angles.

Presiding Examiner: Objection is overruled.

By Mr. Rosenman:

Q. The Examiner has overruled the objection.

A. Under the Hartford compromise of 1786, Massachusetts was given the preemptive rights as to all of Western New York west of what is now called the preemption line.

which runs approximately north and south through the City of Geneva.

That is, Massachusetts was given the right to acquire those titles from the Indians or if it saw fit, and it did, to convey that right to others for a money consideration, so that they could acquire the rights from the Indians.

New York, on the other hand, was given the preemptive rights east of that so-called preemption line, and was assured the government of all the land involved, both Western New York and that east of the preemptive line.

Q. What did the Commonwealth of Massachusetts do with these preemptive rights which it obtained from the Hartford compromise?

[fol. 5156] A. They sold them to certain persons, Phelps and Gorham.

Q. How did Robert Morris get them?

A. Robert Morris acquired from one or both of those gentlemen.

Q. And is that what is referred to in the second paragraph of this so-called treaty on page 87a?

A. Yes, and that suggests to me that I may have been mistaken and that Mr. Morris may have made a direct purchase from the Commonwealth of Massachusetts.

Q. Does this so-called indenture of 1797 which is now inserted in the record represent the purchase by Morris of those preemptive rights from the Indians, or rather the extinguishment of them?

A. He was exercising his preemptive right to acquire the Indian title in the land in question.

Mr. Lazarus: Same objection.

Presiding Examiner: Objection is overruled.

The Treaty speaks for itself.

Mr. Rosenman: Did I understand the objection was sustained?

Presiding Examiner: Overruled.

By Mr. Rosenman:

Q. Is that correct?

A. May I have the question read back?

Q. By this Treaty Robert Morris extinguished all the [fol. 5157] rights to the land which the Senecas owned in Western New York, with the exceptions noted in the treaty, is that correct?

A. That is right.

Q. Now where do those exceptions begin in the Treaty?

Mr. Lazarus: Continuing objection to all this testimony.

Presiding Examiner: It will be so noted.

The Witness: As the Treaty is printed here, they begin about a third of the way down on page 89.

By Mr. Rosenman:

Q. Where it says "Excepting and reserving to them the said parties of the first part," that is the Seneca Nation, "and their nation."

A. Yes. Then there is description of the first reservation, the one at Canawagus, of two square miles.

Q. Have you read all of these reservations?

A. Yes, I am familiar with them.

Q. And how many parcels are included?

A. As I count them now, there are 9 parcels included and also the right of hunting and fishing.

Q. Do those 9 parcels still remain with the Seneca Nation?

A. Yes, those did.

Q. And what reservations do they now comprise of the Seneca Nation?

A. Most of them have been surrendered by subsequent [fol. 5158] treaties, but the Senecas still possess the Cattaraugus and Allegheny reservations, which are mentioned here.

I think at least the Cattaraugus reservation, I believe, has been cut down somewhat from the description here.

Q. Was any of this land comprised in A, B, and C included among these reservations?

A. No. There was no reservation of the parcels A, B, and C or anything near them.

Q. So that at the conclusion of this Treaty of 1797, which was the 15th day of September, 1797, the Holland Land Company was the owner of these three parcels as well as the rest of the land which they bought, is that correct?

A. Yes.

Q. When I say "Morris," by this time had the Holland Land Company become the owner by assignment of his rights?

A. Yes, he had assigned his rights somewhat previous to this Treaty of 1797.

Q. So that after the conclusion of the treaty, the Holland Land Company owned this land?

A. That is right.

Q. Now what treaty was it that gave this land and the other lands in Western New York to the Seneca Nation?

A. The Treaty of Canandaigua in 1794 described the lands of the Senecas and described them in such language that it is clear that it included practically all of Western New York.

fol. 5159] Q. And the Treaty of Canadaigua is what date, page 16a, that is printed at 16a of this Appendix and is printed also in 7 Stat. 44?

A. May I observe that the date at the foot of it is November 11, 1794.

Q. And this was a real treaty between whom?

A. It was a treaty between the United States and the six nations of Indians.

Q. I call your attention to Article 3 of that Treaty. Is that what you mean by the description of the lands which the Seneca were given in Western New York?

A. That is right.

Q. And out of these lands, the Holland Land Company, in accordance with your testimony, and the Big Tree Treaty of 1797, bought everything except the reservations which you have talked about?

A. Yes, sir.

Q. In this document, Exhibit 232-A, this was after the Big Treaty, was it not, May 10th, 1798?

A. Yes, it was about six months after it.

Q. And when it says "It appears that the Tuscarora Indians have been forgotten at the last treaty," what did that refer to?

A. That referred back to the Treaty of Big Tree, which had been held September 15, 1797.

[fol. 5160] Q. At this time, however, the Tuscaroras were actually living on parcel A, were they not?

A. Yes, perhaps somewhat on B. Anyway, they were at least living on A.

Q. And that is 640 acres or one square mile, is that correct?

A. Parcel A is 640 acres.

Q. Now this Exhibit 232-A includes this statement:

"Their claim does not exceed one mile square."

Is parcel A what is referred to there?

A. That undoubtedly is what is referred to.

Mr. Rosenman: And the rest of it speaks for itself, Mr. Examiner.

By Mr. Rosenman:

Q. When it says that the Tuscaroras have been forgotten at the last treaty, was there in the 1797 treaty any mention of the Tuscaroras as having any land reserved for them?

A. There was no mention of the—

Mr. Lazarus: I have objection again.

The Witness: —of the Tuscaroras in that treaty, and no reservation of the parcels A, B, and C.

Presiding Examiner: Objection overruled.

By Mr. Rosenman:

Q. Will you go to page 3, which is Exhibit No. 232-B? This is also taken from the publications of the Buffalo [fol. 5161] Historical Society?

A. Yes.

Q. And will you tell us again, Joseph Ellicott and Casenove and Busty referred to in the title were all connected with the Holland Land Company, were they not?

A. That is right, and the distinction is that Joseph Ellicott was the representative of the Holland Land Company in Western New York and in immediate touch with their affairs there, and Messrs. Casenove and Busty were superiors of his, usually to be found in Philadelphia.

Q. And is this a report from one to the other of what had taken place there?

A. This is a report for the year 1798 from Joseph Ellicott to Casehove and Busty.

Q. And this shows that this tract, parcel A, had been surveyed, or is this something in addition to parcel A?

A. I think he shows that he attempted to survey it. Let's see. May I read from the document?

Q. Yes.

A. "A surveyor was sent for the purpose of laying off said lands," meaning the one square mile, or perhaps two square miles.

Q. Pardon me for interrupting, but this document says:

"They directed that one square mile in addition to the square mile given by Mr. Morris should be laid off at that [fol. 5162] place."

A. Yes.

Q. What does that mean to you?

A. It means that the Senecas directed that one square mile should be laid off for the Tuscaroras in addition to the square mile given by Mr. Morris of the Holland Land Company.

Q. The Senecas? Where are the Senecas mentioned in this?

A. It says "The Indians at Buffalo Creek," and that obviously meant the Senecas, because Buffalo Creek was one of the reservations reserved for them as one of their meeting places.

Q. So this would provide the second square mile for the Tuscaroras?

A. Yes.

Q. Now will you turn to page 5, which is Exhibit No. 232-C. This is in the following year. This is also a report of one employee to another of the Holland Land Company?

A. Yes, that is a report for 1799 from Joseph Ellicott to Busty.

Q. And this was taken also from the same Historical Society publication?

A. That is right.

Q. What does this refer to?

[fol. 5163] A. Ellicott again recites that he has been authorized and instructed to lay out two square miles for the Tuscarora Indians.

Q. Would that be in addition to parcel A?

A. Well, parcel A and presumably part of parcel B were in mind at that time.

Q. When they talk about two square miles, were they talking about parcel B of 1280 acres, or parcel A?

A. My understanding is that they were talking about parcel A and the westerly half of parcel B.

Mr. Rosenman: Has the Examiner finished with this?

Presiding Examiner: Yes.

By Mr. Rosenman:

Q. Will you turn to page 7, which is Exhibit No. 232-D? Was this also taken from the Buffalo Historical Society?

A. Yes, that is from a different volume of publications of the Buffalo Historical Society.

Q. Who was Captain Israel Chapin?

A. He was the United States Indian Agent in Western New York.

Q. And Casenove was an employee of the Holland Land Company?

A. Yes, he was one of the superior officers of the Holland Land Company with an office in Philadelphia.

Q. And what was this letter about?

[fol. 5164] A. The Indian Agent, Mr. Chapin, or Captain Chapin, wrote to Casenove to say that the Tuscaroras were dissatisfied with a mere two square miles because it didn't include all of their houses and farms, and so they felt the need for a third square mile, and Captain Chapin urged that the Holland Land Company grant the Tuscaroras the third square mile.

Mr. Rosenman: I call the Examiner's attention to that part of it, which reads:

"That they found the trace allotted to them was not sufficient to afford them a living, and they had many children among them which they were teaching to work in the manner that white people do, as they found they could not have recourse to any other method, and without a larger quantity of land they must soon leave their poor children in a miserable condition."

And down further:

"They begged their seats may be made so long as to yield them a living and their children after them."

By Mr. Rosenman:

Q. Turning to page 9, which is Exhibit 232-E, this was an answer to that last letter, was it not?

A. Yes.

Q. And this indicates that that request would be granted, is that correct?

A. It does. I want to call attention to the fact that [fol. 5165] on the correspondence to date one wouldn't be sure whether the Tuscaroras were receiving only two square miles or three square miles, but the fact of history seems to be that as a result of these exchanges of letters, they did get three square miles.

Presiding Examiner: They got three in place of two?

The Witness: Originally the Senecas thought they ought to have one. Apparently that was the desire of the Tuscaroras. As soon as they were assured one, they needed two, and after they were assured two, they seemed to have asked for three. Whether Mr. Casenove realized when he wrote this letter of January 31, 1799, that it was in effect granting the third mile, I do not know, but that seems to have been the result.

Presiding Examiner: I thought in reading the letter on page 7, from Captain Chapin, to Casenove, dated January 27, 1799, that in that he said in writing to the Holland Land Company that the Senecas said that if the Holland Land Company would give a square mile, which would be two square miles in addition to the two which the Tuscaroras already had—

The Witness: Yes, the correspondence can be read as referring to four square miles, but it actually only worked out to three.

Presiding Examiner: All right.

Mr. Rosenman: Before going to page 51, I would like to read into the record one statement from the Exhibit [fol. 5166] 232-E, beginning, after saying that the Tuscaroras had made a request:

"Stating for reason of their request that a quantity of their wigwams have not been included in the land lately laid out for their use, and that the tract allotted to them is not sufficient to afford them a living, the cultivation of the land being the only resource they can recur to."

And then in the last sentence of the letter:

"In the meantime, Mr. J. Ellicott shall be directed to lay out that new mile square of land in a manner convenient for both parties in order that everything may be settled and ready when the expected authorization shall arrive."

By Mr. Rosenman:

Q. Do you know, did that authorization arrive?

A. It undoubtedly did, because subsequent maps of the Holland Land Company and others showed the Tuscaroras in possession of three square miles parcels A and B.

Q. That is parcel A of one square mile and parcel B of two square miles?

A. That is right.

Q. Turning to 51, that purports to be what?

A. That is the deed from the Seneca Indians to the Tuscarora Indians of one square mile.

[fol. 5167] Q. That is dated what year?

A. Dated in 1808.

Q. That is 11 years after the Senecas had made this agreement with the Holland Land Company, or Robert Morris, about which you testified?

A. That is right.

The Treaty of Canandaigua was in 1797 and this deed was in 1808.

Q. You do not mean the Treaty of Canandaigua, do you?

A. The Treaty of Big Tree, excuse me.

Q. At this time in 1808 did the Senecas have any title to either parcel A or parcel B?

[fol. 5168] Q. After studying the 1797 Treaty, and particularly the parcels which were reserved by the Senecas, can you say whether or not in 1808 they had any claim, or

any title in either parcel A or parcel B, which they could convey?

A. They had none after the Treaty of 1797.

. . . . . .

[fol. 5185] Q. Are you familiar with New York Assembly Document 51, dated February 1st, 1889?

A. Yes, sir.

Q. Do you have a copy of it there?

A. I have the entire two volumes, and I also have certain excerpts.

Q. Will you state what that document was, or is?

A. In 1888 the Assembly of the State of New York appointed a committee to investigate the Indian problem and report on it to the legislature. And that committee took a great deal of testimony during the year 1888 and reported [fol. 5186] to the legislature early in 1889 so that the testimony and the report and certain documents that they appended became known as Assembly Document No. 51 of 1889, or it is sometimes referred to by historians as the Indian Problem.

Q. And was this a report to the legislature?

A. It is.

Q. Have you had copied out some excerpts from this report?

A. Yes. The document as a whole is 1,280 pages long, and we have here some short excerpts, relatively short.

Mr. Rosenman: I would like to have a number assigned to the excerpts, Your Honor, and perhaps you can take judicial notice of the document itself, which, as you see, is quite voluminous.

Presiding Examiner: It will be marked Exhibit 235 for identification.

(The document referred to was marked for identification as Exhibit No. 235.)

By Mr. Rosenman:

Q. These excerpts include some statistics which I would like to read in the record. For example, on page 2—do you know when the investigation was made? The report is dated February 1st.

A. It was made in 1888, I am quite sure. The report was made February 1st, 1889.

[fol. 5187] Mr. Rosenman: On page 2 it appears:

"On this reservation are 409 Tuscaroras, and about 30 Oneidas, and their numbers are slowly increasing."

The Witness: That paging does not agree with the paging I have here.

Mr. Rosenman: I am talking about page 2 of Exhibit 235, which are the excerpts.

Then on page 6 of these excerpts the figures for 1886 were given as 415 Tuscaroras and 39 Onondaga Indians on this reservation.

And it also appears on the same page that in the year 1887 there were 6,000 acres of tillable land on this reservation, of which 5,000 was cultivated.

And on page 3 of these excerpts is some material about the "National Farm", a term which has been used here frequently, as follows:

"At one time one of their officers had in his possession quite a sum of money belonging to the Nation, which, without any authority, he loaned and eventually lost. He owned and occupied quite a large tract of well-cultivated land; this land he surrendered to the Nation in lieu of the money lost. That land is called the 'National Farm' and is rented to a white man."

[fol. 5188] By Mr. Rosenman:

Q. I call your attention to page 5, which is an historical account. Do you see that?

A. Yes.

Q. Will you state whether any part of this conflicts with any contemporaneous documents?

A. The last sentence certainly is not according to the documents that are already in evidence. It says that the purchase money, $13,722, was a portion of a trust fund held by the United States, in pursuance of the final adjustment of their claims upon North Carolina.

It is clear from the documents that have already been put in evidence, and which were contemporaneous docu-

ments, and presumably more accurate than any recital many years afterwards, that the funds were never held by the United States, but as soon as they were received from North Carolina went direct to the Holland Land Company.

Q. What about the rest of the page?

A. I have not, so far, noticed anything else on that page that is inaccurate.

Mr. Rosenman: I ask that Exhibit 235 be received in evidence.

Presiding Examiner: 235 will be received.

* * * * * * *

[fol. 5201]

BEFORE THE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of:

POWER AUTHORITY OF THE STATE OF NEW YORK

Hearing Room D,
Federal Power Commission,
441 G Street, Northwest,
Washington, D. C.,
Tuesday, December 9, 1958.

The above-entitled matter came on for further hearing pursuant to recess, at 10.00 a. m.

BEFORE:

Harry Frazee, Presiding Examiner.

APPEARANCES:

(As heretofore noted.)

* * * * * * *

[fol. 5202] HENRY S. MANLEY resumed the stand and was examined and testified further, as follows:

Direct examination (continued).

By Mr. Rosenman:

Q. I show you a photostatic copy of what purports to be a recorded instrument. Can you tell us what it is, please?

A. It is a photostatic copy of a document appearing in the records of the Niagara County Clerk, purporting to be a grant from the Tuscarora Nation of Indians in 1835 to the Lockport and Niagara Falls Railroad Company.

Mr. Rosenman: I ask that this be received in evidence.

Presiding Examiner: It will be marked Exhibit 237 for Identification and will be received in evidence.

(The document referred to was marked for identification as Exhibit No. 237 and was received in evidence.)

Mr. Rosenman: Do you think Mr. Examiner, because of the illegibility of this, that Mr. Manley ought to make an effort to read it into the record?

Presiding Examiner: I think it will be easier for the Commission.

[fol. 5203] By Mr. Rosenman:

Q. Can you do that, Mr. Manley?

A. The document is as follows:

"The Council of the Tuscarora Nation of Indians resident at Tuscarora Village in the county of Niagara in the State of New York held at the said village of TUSCARORA on the 15th of September 1835 present the chiefs of said Nation to wit Nicholas Cusick John Mountpleasant Jr. William Chew John Fox William Mountpleasant

"It is agreed by said Chiefs for and in behalf of the said Nation to and with the Lockport and Niagara Falls Railroad Company that the said Rail Road Company shall have the right to construct a Rail Road across the lands of the said Indians without charge let hindrance or obstruction as well over and across the land held by said Nation by right of occupancy as over and across the land held in trust by the secretary of war and occupied by

the said Nation of Indians and the said chiefs for and in behalf of the Nation aforesaid and in consideration that the said Lockport and Niagara Falls Rail Road Company shall construct a rail road from the Village of Lockport to Niagara Falls do hereby release and convey to the said company their successors and assigns forever [fol. 5204] for the purpose of constructing said road so much of the land aforesaid not exceeding a strip three rods in width as may be necessary to the said company for the construction and maintenance of said road and for all other purposes necessarily connected with said road this instrument being intending to embrace a necessary portion of the land known as the Tuscarora Reservation and of the land conveyed to the said Nation of Indians by the Holland Land Company—but it is understood that said rail road shall be made on the line (or so near the same as may be practicable not exceeding four rods therefrom recently surveyed and located by John Hopkins engineer of said rail road company but it is understood and agreed that the said company before entering upon said land shall pay to the said Nation of Indians at and after the rate of thirty-five dollars per acre for the improved land out of the bounds of the public highway which shall be actually taken for and occupied by said road and the said company shall also pay a fair and reasonable price for all timber which they shall take from said land for the construction of said road it is also agreed that the said Indians are to make and maintain the fence along and on each side of said road at their own expense and without charge to said company. [fol. 5205] "In witness whereof the said chiefs have hereunto set their hands and seals the day and year first above written (forever interlined before execution) sealed and delivered in presence of

W. Hunt
Calvin Hotchkis."

The signatures are:

Nicholas Cusick Seal
William Chew Seal
John Fox His mark Seal
John Mountpleasant Jr. Seal
William Mountpleasant Seal"

[fol. 5206] Cross examination.

By Mr. Lazarus:

Q. Mr. Manley, in the course of your direct testimony you stated that the treaty of 1794, the treaty of Canandaigua was signed by the Six Nations, entered into and signed by the Six Nations. Did those Six Nations include the Tuscarora Nation?

A. Yes, my understanding is it included the Tuscaroras.

Q. Now, going forward to the agreement of 1797, the agreement that Big Tree—was that? You referred in your direct examination to the areas of land that were reserved by the Indians and said that there were a number specifically recited in the treaty. Was the reservation which is now known as the Oil Springs Reservation specifically set out in the treaty?

A. No, it was not.

Q. Was it subsequently determined, however, that the Oil Springs Reservation was intended to be within the treaty?

A. There was a map made at the time of the treaty by the Holland Land Company which included the Oil Springs Reservation among those reserved.

Q. And has not the Oil Springs Reservation been recognized as a reservation ever since that date, 1797?

A. I would not say that it has been ever since, because there was some litigation about it in the New York courts [fol. 5207] about 1845 or '55, somewhere along there. But as a result of that litigation it was determined that it was a reservation.

Q. Even though not specifically referred to in the language of the 1797 treaty?

A. Yes, it was established through that map, made contemporaneously with the treaty, that it was intended to reserve that reservation.

* * * * * * *

Mr. Lazarus: Your Honor, I would like to direct your attention to a volume which is labeled, "Compilation of Material Relating to the Indians of the United States and the Territory of Alaska, Including Certain Laws and

Treaties Affecting such Indians, Prepared by the Subcommittee on Indian Affairs of the Committee on Public Lands, House of Representatives, Pursuant to H. Res. 66, 81st Congress, Second Session, Dated June 13, 1950."

[fol. 5208] At page 90 of this volume there is a reference to the "Tuscarora Reservation; New York State Agency, Niagara County, New York; 430 Tuscarora and Onondaga Indians; 6,249 acres; est.," which I assume means established, "1838."

Mr. Rosenman: What page is that?

Mr. Lazarus: That is on page 90. That is the entire reference there.

By Mr. Lazarus:

Q. Now, with respect to 1838, can you give the Commission some idea as to why that date might have been picked?

A. Yes, I think I can. The 1838 treaty, as you and I know very well, did not establish this reservation. On the contrary, the whole purpose of the 1838 treaty was to disestablish this reservation and get all the Indians in New York State removed from New York State to the West.

But the gentlemen who make up tables of that sort for the Indian Bureau have had a hard time finding any treaty that had any relation to the Tuscarora Reservation, and so they seized on the 1838 treaty as a source of the Tuscarora Reservation.

I regard that ascription as ridiculous.

Q. Is it not true that the provisions of the 1838 treaty were not carried out?

A. That is right.

Q. So that the land after 1838 was actually in the same status as prior to 1838?

[fol. 5209] A. That is right.

Mr. Lazarus: On page 521 of this same volume there is the following quotation with respect to the Tuscarora Reservation:

"There were 430 Tuscarora Indians on this reservation in 1945. In 1929, Onondaga Indians were also listed as

being on this reservation. The original area and the area in 1945 was 6,249 acres of tribal lands."

* * * * * * * *

Q. I believe yesterday on voir dire you identified this document as an affidavit which you had sworn to for use in the United States District Court for the Western District of New York?

A. That is right.

Q. The date of this affidavit is June 4, 1958; am I correct?

A. That is right.

Q. On page 23 of the affidavit the following quotation appears:

"Excepting the Major Crimes Act in the past 100 years [fol. 5210] and more the United States has not exercised any guardianship over the Tuscarora Indians."

Is that your statement?

A. That is my statement.

* * * * * * *

[fol. 5212] By Mr. Lazarus:

Q. Now getting back to your statement in the affidavit, Mr. Manley, how would you describe an act of guardianship within the meaning of this sentence that I quoted from your affidavit?

A. Well, I would assume that if the United States had been acting as guardian of the Tuscarora Indians, they would have insured in some fashion that their lands were not occupied by non-Indians. On the contrary, the Commissioners of Indian Affairs have on many occasions, early and late, asserted that they had no jurisdiction over the lands of the Tuscaroras.

Q. Is it your testimony that the United States has never attempted to stop non-Indians from using the lands within the Tuscarora Reservation?

A. I know of no such case, and I know that their help has many times been asked and has been withheld.

* * * * * * * *

[fol. 5214] Mr. Lazarus: For the record, Your Honor, I would like to read into the record the text of a letter

and attachment—excuse me, this is a letter, and the attachment was to a separate letter. Both of them are from the [fol. 5215] Department of the Interior.

Mr. Hobbs: I wonder if I could take a look at those?

Mr. Lazarus: Sure. These were both exhibits in the District Court in the Western District of New York.

Mr. Hobbs: Thank you.

Mr. Lazarus: The first of these is, as I said, under the letterhead of the United States Department of the Interior, Bureau of Indian Affairs, Washington 25, D.C., addressed to Messrs. Strasser, Spiegelberg, Freed & Frank, Attorneys at Law, 1700 K Street, Northwest, Washington 6, D.C., Attention Mr. Lazarus.

"Gentlemen:

"Enclosed is the original of the contract between the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Freed & Frank. This contract was conditionally approved by the Deputy Commissioner on April 17, 1958, and the conditions have been accepted by the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Freed & Frank.

"Sincerely yours,

"Thomas M. Rein,
"Assistant Commissioner."

The second document is the conditional approval of April 17, 1958, again under the letterhead of the Department of the Interior, Bureau of Indian Affairs, Washington 25, D.C.:

[fol. 5216] "The foregoing contract between the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Freed & Frank, is hereby approved under authority delegated to me by Secretarial Order Number 2508, as amended (15 Fed. Reg., 1570), pursuant to Section 2103 of the United States Revised Statutes (25 U.S.C. 81), subject to the following conditions: . . ."

Unless you have some objection, I won't bother reading the conditions because they are not here material. And the May letter indicates they were agreed to.

Mr. Rosenman: Will Mr. Lazarus state whether he requested the Department to approve the contract?

Mr. Lazarus: Any contract I enter into with any Indian tribe I ask the Department to approve because that is required by law.

Mr. Rosenman: Is that true of this contract?

Mr. Lazarus: Yes, sir.

I would like to point out that 25 U.S.C. 81, I believe this Court can take judicial notice, relates to contracts with Indian tribes "relative to their lands".

. . . . . .

[fol. 5225] By Mr. Lazarus:

Q. Now, Mr. Manley, do you think this action by the [fol. 5226] United States Department of the Interior, refusing approval of the Department to the execution of a lease for acquiring limestone on the Tuscarora Reservation, and notifying the United States Attorney for the Western District of New York that such a lease was not authorized, constitutes an act of guardianship?

A. Certainly if such activities were customary in the relationship between the United States and the Tuscaroras, I would think that that was guardianship.

Q. Now why do you draw a distinction between the act if it is one of a series, and the act if it happens to be just one? Is it not an act— Answer that question, why do you draw the distinction?

A. Because I know there are a great many formal statements like by the Commissioner of Indian Affairs and by the Secretary of the Interior, running over the years, to the effect that they have little or no function relative to the Indians in New York State. And I know as a matter of fact that that is true about their handling of most correspondence relative to the Tuscaroras.

. . . . . .

[fol. 5233] Mr. Lazarus: The first letter here is under the letterhead of the United States Department of the Interior, Office of Indian Affairs, Washington, dated De- [fol. 5234] cember 8, 1950. It is addressed to Audit Division, General Accounting Office, Washington 25, D. C.

"Gentlemen:

"There is enclosed the original of an attorney contract between the law firms of Howard D. Moses and James R. Bryant of Chicago, and Blake, Voorhees and Stewart, and the Tuscarora Indian Nation of New York for the prosecution of tribal claims against the United States. The contract was approved by the Commissioner on November 8 and has been assigned Symbol No. I-1-IND 42422. The contract has been recorded in the office in Miscellaneous Record Volume 17, page 47.

"Sincerely yours,

"H. M. Critchfield, for the Commissioner.

"Copies to Mr. A. Devitt Vanech; Assistant Attorney General;

"Tuscarora Indian Nation, with a copy of the contract;

"Riegelman, Strasser, Schwarz & Spiegelberg;

"Blake, Voorhees & Stewart, with a copy of the contract;

"Howard D. Moses and James Bryant."

Now, the next document is the contract itself, which is dated July 31, 1950, by and between Chief Elton Greene, President; Chief Harry Patterson, Secretary; and Chief [fol. 5235] John J. Hill, Treasurer of the Chiefs' Council, acting for and on behalf of the Tuscarora Indian Nation, party of the first part, and Howard D. Moses and James R. Bryant, 231 South LaSalle Street, Chicago, Illinois, and Blake, Voorhees & Stewart, 20 Exchange Place, New York City, parties of the second part.

At the back there is, under the letterhead of the United States Department of the Interior, Bureau of Indian Affairs, Washington 25, D. C., under date of November 8, 1950, the following statement:

"The foregoing contract between the Tuscarora Indian Nation and the law firms of Howard D. Moses and James R. Bryant and Blake, Voorhees & Stewart is hereby approved under authority delegated to me by Secretarial Order No. 2508, dated January 11, 1949 (14 Fed. Reg.

258, 260) pursuant to Section 2103 of the revised statutes of the United States (Section 81, Title 25, U.S.C.)."

This is signed D. S. Myer, Commissioner of Indian Affairs.

. . . . . .

[fol. 5239] By Mr. Lazarus:

Q. Mr. Manley, on examination yesterday you were asked about a trust fund held by the United States for the purchase of land for the Tuscaroras and you have testified on direct that no such fund was held by the United States. Is it not true that the money realized from the sale of the lands in North Carolina was paid to an agent of the United States and in turn was disbursed by an agent of the United States to pay for the land in New York.

A. The photostat receipt that we put in evidence yesterday, and I do not know its number at the moment, showed that the money was paid from Dr. Davy and I guess he can be described as an agent of the United States although it also appears that he was paid by the State of Carolina.

Apparently, he acted on behalf of the Indians; according to Secretary Dearborn's letter.

Anyway, the money was paid from Mr. Davy to Mr. Busty who was a representative of the Holland Land Company, and he gave his receipt for it and said that it would be endorsed and credited on the mortgage of the Holland Land Company which was held by Mr. Ellicott at Batavia.

Q. Mr. Manley, are you familiar with the book entitled [fol. 5240] "Handbook of Federal Indian Law."

A. Yes.

Q. By Felix S. Cohen, published by the Department of the Interior.

A. Yes.

. . . . . .

[fol. 5241] By Mr. Lazarus:

Q. There appears this statement:

"These several treaties"—with the footnote reference to the Treaties of 1784, 1789 and 1794—"guarantee to the Iroquois (6 nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws."

Do you agree with that statement?

A. No.

* * * * * * *

[fol. 5244] Cross examination.

By Mr. Grossman:

* * * * * * *

[fol. 5245] Q. Now, Mr. Manley, do you know why the Tuscaroras acquired that parcel of land shortly after 1800?

A. Yes, I think I do.

Q. And what was that reason?

Mr. Hobbs: What parcel are we talking about?

Mr. Grossman: Parcel C.

The Witness: They said that hunting had ceased to be an important means of support.

Mr. Lazarus: Excuse me, what is the question?

Mr. Grossman: The question was, do you know why they [fol. 5246] acquired that area designated as Parcel C?

Mr. Lazarus: Then I object to the question on the ground that it calls for a conclusion from the witness which he is not qualified to make.

As a matter of fact, it is the very issue before this court.

Presiding Examiner: He can testify to what the record shows that the Indians said was their reason for acquiring it.

Objection is overruled.

The Witness: The Tuscarora Chiefs told Quaker Hopkins, just as they were in the course of negotiations to

acquire this land; that their hunting was declining and they needed this additional land for agriculture.

. . . . . .

[fol. 5249] Redirect examination.

By Mr. Rosenman:

Q. Mr. Lazarus asked you about the Oil Spring Reservation.

[fol. 5250] What was your testimony with respect to a map that was drawn contemporaneously with the agreement?

A. In the litigation which was occurred in the courts of the State of New York and went to the highest court of that state and was decided there in favor of the Indians—in other words, to the effect that the Oil Spring Reservation was intended to be reserved in the 1797 Treaty, and was to be regarded as a Seneca reservation.

The decisive testimony seems to have been a deposition given by Governor Black Snake, a very old Seneca Chief, who testified that he was at Big Tree at the time the 1797 Treaty was entered into, and that he was there given a map by Joseph Ellicott which defined the reservations of the Senecas, and that on that map which was produced in connection with his deposition there was outlined a reservation of one square mile at Oil Spring.

Q. Is there any such map that you have ever heard of in connection with the Tuscarora Reservation?

A. No, there is no map of the Holland Land Company prior to 1800, which shows the Tuscarora Reservation.

Q. And is that the reason for your testimony that there was not reserved for the Senecas or anyone else in the 1797 Treaty either Parcel A or B or C?

A. Well, the map confirms what it seems to me is stated explicitly in the correspondence between Ellicott and Case-[fol. 5251] nove.

Q. To what effect?

A. To the effect that the Tuscaroras were forgotten in the 1797 Treaty.

Mr. Rosenman: I would like to read into the record, Mr. Examiner, from the same book that Mr. Lazarus read.

compilation of material relating to the Indians of the United States, etc., from page 524.

After the portion which he read it states:

"Under a Treaty of January 15, 1838, with the Six Nations, the Tuscaroras agreed to move to land set aside for them in the Indian Territory and were to receive $3,000 when they moved. They ceded to the United States 5,000 acres of land in Niagara County, New York, to be sold by the President and invested for their benefit"—and this is the important part—"and agreed to sell the Tuscarora reservation or Seneca grant containing about 1920 acres which they then occupied [but they remained on these lands] (7 Stat. 550-564).

"The original area and the area in 1945 was 6,249 acres of tribal lands."

By Mr. Rosenman:

Q. Is that statement correct?

A. No, in my opinion it is incorrect.

[fol. 5252] Q. In what respect?

A. I think it is a mistake to attach the phrase "tribal lands" which is a phrase used in connection with the Western reservations and the other reservations in the United States to any lands in the State of New York.

The result of it is to affix to these lands in the State of New York which have an authentic history and a unique status some of the incidents which have been affixed to reservations created by the United States through the free methods by which such reservations are created.

Q. And what about the acreage itself?

A. Well, of course, as the Chiefs have testified here, the acreage is largely in the hands of individuals nowadays and isn't under any conception of the phrase "tribal lands" to be regarded as completely tribal land.

Mr. Rosenman: I would like to ask the Examiner to take judicial notice of the case of Tuscarora Nation of Indians against Williams, 79 Miscellaneous 445, which also treats with the expression "tribal lands."

This is a New York State Supreme Court Case.

By Mr. Rosenman:

Q. Mr. Lazarus read to you an excerpt from the opinion of Cusick against Daly, do you recall that, in which the Court stated something about the purchase of this parcel of land from moneys received from the United States authorities?

[fol. 5253] Do you recall that?

A. Yes, I noticed that when he read it.

Q. Was the money which was used for the Holland purchase received from the United States authorities?

A. No. The method by which the money was handled has been described here and I think more accurately than it was in that opinion.

Q. With respect to the guardianship which is set forth in your affidavit, about which Mr. Lazarus interrogated you, have you found any instances in which the United States or the Department of Interior or any agency of the United States exercised any guardianship with respect to the erection of transmission lines on the reservation?

A. No.

Q. Is that also true about grants to railroads?

A. They have never exercised any jurisdiction in that connection so far as I know.

Q. What about the construction of roads, either by the State or the county or town on the reservation?

A. That matter has been handled by the State, so far as I know.

Q. What about electric poles, and other kinds of poles to carry wires across the reservation?

A. I know of no approval by the United States for those things.

[fol. 5254] Q. Is that true of telephone wires?

A. I think it is so.

Q. What about the leasing of lands to outside white farmers? Has there ever been any exercise of guardianship with respect to that?

A. No.

Q. More particularly with respect to the easement given by the nation to the Niagara Mohawk Power Corporation last March, 1958, was there any exercise of guardianship with respect to that?

A. Not to the best of my knowledge.

Q. And is your testimony the same with respect to the two prior occasions in which the Niagara Mohawk or its predecessors obtained similar easements from the Tuscarora Nation, namely, in 1937 and 1942?

A. I do not know whether there was any request for approval by the United States, but to the best of my knowledge, there was no such approval.

Q. Was there any approval with respect to the document which was marked in evidence this morning, Exhibit 237, the grant of the right of way to the Lockport-Niagara Falls Railroad?

A. Of course, that was in 1935, and it is pretty hard to say definitely what was done that long ago, but I have searched diligently and haven't found any action of the [fol. 5255] Interior Department relative to that matter.

Q. Is that true with respect to the right of way which the Tuscaroras leased for a railroad through the northeast portion of their lands?

A. I would like to amend my last answer, if I may, and say that I have also searched for action by the War Department which had these matters in charge until 1849 and I couldn't find any action by the War Department relative to the 1835 transaction.

And now, answering your later question, I know of no action relative to the later leasing.

Q. Is it also true with respect to contracts or agreements which individual Tuscarora Indians have entered into with the New York Telephone Company permitting the company to maintain poles and lines on their allotted land?

Was there any guardianship exercised by the Federal authorities on that?

A. I have never been able to find any record of any such guardianship, and I have searched for it.

Q. What about the schools on the Tuscarora Reservation since 1802? Has there been any Federal supervision or guardianship or assistance with respect to those?

A. It has been many times stated, and I thoroughly agree, I guess, that the matter of schools on all the reservations in the State of New York, including the Tuscarora

[fol. 5256] Reservation, has been under the State of New York, and at its expense."

* * * * * * * *

Q. In answer to a question by Mr. Lazarus after reading from the Handbook of Indian Law by Mr. Cohen, Felix Cohen, you stated that in your opinion the statement made by Mr. Felix Cohen was incorrect, is that right?

He asked you whether you agreed with that statement.

A. I said that I didn't agree with it.

Q. Now will you tell us why, taking this up treaty, by treaty, please?

The first treaty mentioned in the question was the Treaty [fol. 5257] of 1784, which is set forth, Mr. Examiner, on page 11a of the Appendix.

Mr. Lazarus: I object to this line of questioning, Your Honor. My inquiry was merely addressed to whether he agreed with an authority in the field of law.

Now the various reasons as to why the two people came to different conclusions are not material.

Those are questions of law.

Mr. Rosenman: I think it is very material, Mr. Examiner. He is quoting a purported expert on the question. He has asked the witness whether the witness agrees with the statement, and I think all authorities permit me to inquire of the witness the reasons for the disagreement.

Presiding Examiner: Objection is overruled.

By Mr. Rosenman:

Q. The Treaty of 1784, first. Do you have that in front of you?

A. Yes. We have it in this appendix that was submitted to the Western District of New York. It appears in there at pages 11 and 12. The Treaty of 1784, in its second paragraph says:

"The Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled."

But I am very clear that that did not refer to either [fol. 5258] parcels A, B, or C or any land in Western New York.

* * * * * * * *

[fol. 5259] A. In order to understand what this Treaty of 1874 meant, you will have to know—

Q. 1784?

A. 1784, excuse me—you will have to know the history of the times and what the conditions particularly in regard to the Oneidas and the Tuscaroras were at that time.

The Tuscaroras had come from North Carolina sometime in the 18th Century and before the Revolution. The usual date given when a single year is given is 1713 or 1715, but I think most of the books agree that they didn't come all at once. They came in waves or by groups over a period of about 50 years, commencing about 1715.

Anyway, when they came into New York State, they settled in central New York in the land of the Oneidas south of Oneida Lake and all the way down to what is now the Pennsylvania border.

Q. I think you told us that was some 200 miles east of their present dwelling.

A. That is right. They remained there until the Revolution. During the Revolution, as is well known, most of the Six Nations took the part of the British, particularly the Mohawks and the Senecas were outstanding as partisans of the British.

The Tuscaroras and Oneidas, on the contrary, agreed to be neutral, and in fact, many of them fought on the side of [fol. 5260] the Colonists so that at the end of the Revolution the Oneidas and Tuscaroras were in central or eastern New York and the Senecas and Mohawks were predominantly in western New York and the British still held the fort at Niagara and were in control of that end of the state.

Now that condition existed right down to 1784, when this Treaty was entered into, and just before this Treaty, about a year before it, the State of New York had made a plan to remove the Oneidas and Tuscaroras from central New York and place them in western New York on the lands of the Senecas.

That plan of the State of New York is a matter of record and it was opposed by General Schuyler and by General Washington, and eventually wasn't carried out. But it was still a plan at the time this Treaty of 1784 was entered into.

and that was the reason that the United States, in this Treaty of 1784, in Article 2, made special mention of the Oneidas and Tuscaroras and said that "They shall be secured in the possession of the lands on which they are settled." And what was meant there was the loyal Oneida and Tuscarora members, the ones that had adhered to the Colonists and who were then on—

Mr. Lazarus: Your Honor, I object. I have listened to the answer here and I still have not gotten an inkling of the response to the question that was asked.

The question was asked with reference to the 1784 Treaty as to why this witness disagrees with the conclusion in the [fol. 5261] handbook of Federal Indian Law as to placing the lands of the Six Nations beyond the reach of state law. Now, of course, that just calls for an expression of a legal opinion by the witness contrary to the legal opinion expressed in the text, but now we have had for about five minutes a discussion of purported history which does not relate to the question that was asked.

Mr. Rosenman: For a proper understanding of this, and for the reasons of the disagreement, this historical data is absolutely necessary.

Presiding Examiner: You may proceed, Mr. Manley.

The Witness: I do feel apologetic for the length that is necessary to go into a question of this sort, but it is not an easy question that can be—the jurisdiction over the New York Indians is a very peculiar question that has its roots in 150 years of history, and it cannot be answered in a word, and I do not think it would be fair to Mr. Cohen to explain why I cannot completely subscribe to what he said and what, incidentally—it is apparent from the revision recently—the Department does not subscribe to, without a complete explanation.

So if I may, I will proceed with the explanation.

In brief, it is that while a casual reading of this treaty of 1784 might lead one to suppose that the United States was at that time guaranteeing the reservation which the [fol. 5262] Tuscarora Indians held at that time, that is held at this time, that is not the fact for various reasons. One of them is that the United States was at that time rewarding the loyal Oneida and Tuscaroras by securing them in the

possession of their lands in central New York from which the State of New York desired to remove them.

The fact that the United States was either disinterested or unaware that there were any Tuscaroras in western New York at that time or at least on parcels A, B, and C, which are involved here, is shown by Article 3 of that same treaty, by which the lands of the Six Nations are defined as east of a line drawn four miles from the carrying place along the Niagara River.

By Mr. Rosenman:

Q. Let me interrupt you, Mr. Manley. Article 3, it is your testimony, is no longer dealing with the lands in central New York, is that correct?

A. That is right. It is dealing with a different matter.

Q. Article 3 is dealing now with the lands with which we are concerned in western New York, is that right?

A. Yes, that is right.

Q. Proceed.

A. And one of the purposes of Article 3 was to define the lands of the Six Nations as all east of a line drawn four [fol. 5263] miles east of the carrying place along Niagara River.

Mr. Rosenman: Will you pause long enough so I can ask the Examiner to give this map a number, entitled "Tuscarora Reservation," which is similar to Exhibit 231, except that it has these various treaty lines marked.

The parties to this proceeding have copies of this map. It was included in the District Court brief. We do not have any copies here except in that brief.

Presiding Examiner: It will be marked Exhibit 239 for identification.

(The document referred to was marked Exhibit No. 239 for identification.)

By Mr. Rosenman:

Q. Will you, as you testify, please refer to these various treaty lines so that the Examiner can follow you?

A. Exhibit 239 shows that irregular line running north and south across parcel B and also across the middle of parcel C.

Q. And it is labeled "Boundary under 1784 and 1789 Treaties," is that correct?

A. That is correct.

That is the line 4 miles from the carrying place along the Niagara River.

Q The carrying place is indicated here by a dotted line, is it not, alongside the Niagara River. It is called "Carrying Path," is that correct?

[fol. 5264] A. That is right.

Q. And this line which you have just described is four miles to the east of that, is that right?

A. That is right, and the significant thing to which I was leading up is that it is completely east of parcel A which is the lands that the Senecas eventually gave to the Tuscaroras and upon which presumably some Tuscaroras were living in 1784.

Q. Now this treaty, Article 3 of the 1784 Treaty which established this line, what did it provide as to the territory to the east of that line and the territory to the west of that line?

A. As to the territory to the east of the line and to a certain line drawn on the east of that, it was the territory of the Six Nations.

As to the territory west of that line, it was to be regarded as ceded to the United States, so that the United States would have possession of the militarily significant carrying place and an area four miles beyond it.

Q. So that under this treaty at least in 1784 parcel A was within the territory which was ceded to the United States.

A. That is right.

Q. Now turning to the next treaty which was mentioned by Mr. Cohen and adverted to by Mr. Lazarus, the Treaty of 1789, that is set forth at page 13a of the Appendix.

[fol. 5265] Will you state what that treaty did?

A. That, in effect, confirmed what had been done in 1784 and for the purposes that we are now involved with I do not think it changed it or added to it.

Q. I call your attention to Article 3 of that treaty. Do you see it on page 14a?

A. I will read it:

"The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Q. What did that refer to, which lands?

A. It referred to the same lands in central New York with the important difference that in the meantime in 1785 the Oneidas and the Tuscaroras had released to the State of New York part of the land so it did not refer to quite as much land in 1789 as it did in 1784.

Q. Do you know was the westerly line of the land in the same place as you have described for the 1784 Treaty?

A. Yes, still four miles east of the carrying-place.

Mr. Hobbs: May I ask a clarifying question here?

Mr. Rosenman: Surely.

Mr. Hobbs: Where is the carrying place?

The Witness: It is that dotted line.

Mr. Hobbs: Path along the river?

The Witness: It was necessary, of course, for boats [fol. 5266] to be unloaded below the falls. As a matter of fact, they were unloaded near where Lewiston now is, in other words, below the rapids, and the goods on the ships were carried from there to a place above the falls where they were again embarked to go through Lake Erie.

Mr. Hobbs: Thank you.

By Mr. Rosenman:

Q. Now will you turn to the third treaty which was mentioned in Mr. Lazarus' question? That is the Treaty of 1794 called the Canandaigua Treaty.

That is on page 16a of the Appendix.

A. Yes.

Q. Will you describe what that was about?

A. That treaty was again a treaty of peace between the United States and the Six Nations of Indians. It is significant that when it, in Article 2, acknowledges the lands reserved as belonging to certain nations, it does not refer to the Tuscaroras at that point.

But there was a separate Treaty of 1794 made with the Tuscaroras and referred to them as the Tuscaroras residing on the lands of the Oneidas. That second Treaty of 1794 is the one that was printed at pages 20-21 of the Appendix, printed for the use of the Western District of New York.

Q. Now turning to the Treaty between the United States and the Six Nations in 1794, Article 2 thereof refers to [fol. 5267] which lands?

A. It refers to the lands of the Oneidas, the Onondagas and Cayuga Nations.

Q. It also says "Their Indian friends residing thereon and united with them."

A. Yes.

Q. Where are these lands situated?

A. The most westerly of those three was the Cayuga Nation which presumably was about Cayuga Lake. The Onondagas were in Central New York, not far from where the City of Syracuse now is, and the Oneidas were further southeast of Oneida Lake.

Q. And none of these lands involve the territory that we are concerned with in western New York.

A. That is right.

Q. Now what about Article 3? What does that refer to?

A. That refers to the lands of the Seneca Nation, which are the most westerly lands involved.

Q. I notice in the preceding two treaties it spoke about the land of the Six Nations. Do you recall that?

A. Yes.

Q. In this Article 3 the land of the Seneca Nation is considered only, is it not?

A. That is right.

Q. Is that the same land as the other treaties dealt with? [fol. 5268] A. Yes. The representatives of the United States had learned that more accurately they should not refer to the lands of the Six Nations, but that each tribe was to be considered as owning certain lands itself.

Q. What did this Treaty do with respect to this western land which included parcels A, B, and C?

First of all, what did it do about the boundary which had been set in the 1784 and the 1789 Treaties?

A. It eliminated that line-four miles east of the carrying place as the westerly boundary of the Seneca land, so apparently it restored to the Senecas so much of that as was not taken away by Article 5.

Article 5 saved to the United States, or had the Seneca Nation cede to the United States, enough land for a carrying road.

Q. So that this line on this map, 239—Exhibit 239, entitled "Boundary More Favorable to Indians Under the 1794 Treaty" is the boundary that was set by this Treaty?

A. Yes, that is set as accurately as can be done in the light of historical evidence.

Q. In other words, this old boundary between the Seneca land and the United States land is moved to the west, giving the Seneca more land and the United States less, is that correct?

A. That is right.

Q. Now do you notice the clause at the end of Article [fol. 5269] 3 which I read, after stating the Seneca land, and after the United States acknowledges that land to be the property of the Seneca Nation, it says:

"And the United States will never claim the same nor disturb the Seneca Nation, nor any of the Six Nations or of their Indian friends residing thereon, and united with them in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase."

What does that clause mean, "but it shall remain theirs until they choose"

Mr. Lazarus: Objection, Your Honor. It calls for a legal conclusion.

Presiding Examiner: I think he can testify if he has an opinion as to what it means.

The Witness: Yes, I have an opinion as to what that means. It means when it refers to the people of the United States who have the right to purchase, it means those who have the preemptive right to purchase.

By Mr. Rosenman:

Q. Is that the right about which you testified yesterday?

A. Yes.

Q. Proceed.

A. In other words, as to this particular land, it meant [fol. 5270] the grantees of the State of Massachusetts.

Q. And this provided that the Senecas and their friends, and so forth, would be permitted to remain there until they sold to the people who are entitled to buy, is that correct?

A. That is right.

Q. Now at the time of this Treaty in 1794, who owned these preemptive rights?

A. Holland Land Company I think had acquired them by that time. They certainly had acquired it before 1797, and I think they owned it as early as 1794.

Q. And the Holland Land Company, as you testified yesterday, had bought these preemptive rights from the State of Massachusetts.

A. They had bought them from persons who in turn had bought them from the State of Massachusetts.

Q. Robert Morris was the purchaser of the rights and he had assigned them to the Holland Land Company so that the Holland Company had these preemptive rights, is that correct?

A. There were some other persons involved in the transactions with Massachusetts, but Robert Morris was one of them and he is the only one we need to remember for present purposes.

Q. In his agreement with Massachusetts, he had agreed to buy this right of occupancy, had he not, from the Indians, or was it the agreement—

[fol. 5271] A. May I have that question read again?

Q. Withdrawn.

Did the Holland Land Company agree to buy this land from the Indians, or to use a technical expression, extinguish the rights of occupancy of the Indians?

A. Robert Morris, when he sold to the Holland Land Company, agreed that he would for their benefit and at his own expense, extinguish the Indian rights as to that land.

Q. And this was done, as you testified, in the Treaty of Big Tree, in 1797?

A. Yes, he did that at that Treaty.

Q. So that who were the people, to go back to Article 3 of the Treaty of 1794, who were the people who have the right to purchase, to quote the language?

A. Robert Morris, or, of course, the Holland Land Company could have done it itself, if it had chosen, but naturally inasmuch as Robert Morris was bound to do it for them at his expense, they left it to him to do.

Q. And this was done in 1797?

A. That is right.

Q. So that since 1797 on, all of the Indian rights in parcels A, B and C and millions of other acres were sold to the Holland Land Company and there was reserved only those specific parcels that you testified to yesterday in the Seneca Nation?

[fol. 5272] A. That was the result of the Treaty of 1797.

Q. So that after 1797 all of this land to the west, all of this land in western New York, except those parcels reserved for the Senecas, had title in the Holland Land Company?

A. That is right.

Q. And this was before the documents which you testified to yesterday relating to parcel A or B?

A. That is right.

Those documents of course show where the matter was picked up after the Treaty of 1797.

Q. Will you look again at Article 3 of the 1794 Treaty. As that is drawn, isn't it true that there are two eastern boundaries, two boundaries mentioned between the Seneca land and the United States land?

A. I know there has been some uncertainty as to just where the line should be drawn in the light of that article.

Q. But this boundary line which appears on Exhibit 239 is the boundary line which gives most to the Seneca Nation and least to the United States.

A. That is right.

Q. Are these the reasons that you disagree with what Felix Cohen has said?

A. Well, that is part of the reason, but after all, the principal reason for knowing that the reservations were [fol. 5273] not removed completely beyond the control of the State of New York is that I know for 150 years the State of New York has exercised that jurisdiction to a large extent.

* * * * * * *

[fol. 5274] HENRY S. MANLEY resumed the stand and testified further as follows:

Redirect examination (continued).

By Mr. Rosenman:

Q. During the noon recess did you get a photostatic copy of a letter dated February 24, 1941, from the Department of Interior, addressed to Mr. Berry, the superintendent of the New York agency?

A. I got the letter from the National Archives, but it is the letter that you describe.

Mr. Rosenman: I only have this copy, Mr. Examiner, and therefore I think it would be best to read it in the record. We do not have copies.

Presiding Examiner: Have you examined it, Mr. Lazarus?

Mr. Lazarus: Yes.

The Witness: The letter is on the letterhead of the United States Department of the Interior, Office of Indian Affairs, Washington. The date is February 24, 1941.

"Mr. C. H. Berry,
Supt., New York Agency.

[fol. 5275] "My dear Mr. Berry:

"This will refer to your letter of January 9 with which you enclosed correspondence from Mr. William Mt. Pleasant, Secretary of the Tuscarora Indian Council, concerning the removal from the Tuscarora Reservation of certain Canadian born-Indians.

"As we have heretofore pointed out, the Federal Courts have uniformly held that the State Courts are without

authority to interfere with the internal matters arising among the Indians of the same reservation. At the same time, these courts have pointed out that, in the absence of legislation by Congress conferring jurisdiction on the Federal Courts, they are also without authority to interfere in the internal affairs of the Indians within the same reservation, but that such internal affairs of the tribe are subject to determination by the proper tribal authorities of the reservation in accordance with tribal laws and customs, without interference or dictation from the State or Federal Courts. See United States v. Charles, 23 Fed. Sup. 347; Washburn, et al. v. Parker, et al., 7 Fed. Sup. 120; Rive v. Maybee, et al., 2 Fed. Sup. 669.

"It may be further pointed out that in the absence of express legislation by Congress to that effect, this Department is without authority to interfere in the internal [fol. 5276] affairs of the Indians within the Tuscarora Reservation.

"In the circumstances, the matter presented by Mr. Mt. Pleasant appears to be one to be handled by the Tribal authorities of the reservation.

"Sincerely yours,

/s "Fred H. Daiken
Assistant to the Commissioner."

By Mr. Rosenman:

Q. Are you familiar with the letter of July 9, which Mr. Lazarus referred to in his examination earlier this morning?

A. I have not seen it since July 9. I did see it on that occasion.

Q. And do you remember when it first was presented?

A. Yes, it was presented on July 9 a few minutes before the case was argued before the Court of Appeals, Second Circuit. Excuse me, did I say on July 9?

Q. Yes.

A. I think it was on the 10th, wasn't it, on July 10, a few minutes before it was argued.

Q. But this was in New Haven, at the argument before the Second Circuit Court of Appeals on appeal from the

decision of the District Court for the Western District of New York?

A. That is right.

Q. And that is the first you heard of it?

[fol. 5277] A. That is the first and only time I saw that letter.

Q. I want to ask you in general, Mr. Manley, do you know of any treaty in which the United States was a party which set up the reservation which the Tuscaroras now have, or any part of it?

A. I know of no such treaty.

Q. Do you know of any act of Congress which does that?

A. No.

Q. Do you know of any executive order of the President which does that?

A. None.

. . . . . .

[fol. 5280] By Mr. Lazarus:

. . . . . .

[fol. 5284] Q. You testified on redirect examination that you know of no federal approval given to the Niagara Mohawk Transmission Line—that is the recent one—across the Tuscarora Reservation. Do you know whether the Federal Government was ever asked to approve that right-of-way?

A. No, and I think I testified to that effect.

[fol. 5285] Q. Do you know of any instance where the Federal Government was asked to approve a lease on the Tuscarora Reservation, or a right-of-way across it, or an easement on the reservation, where the Department said that the lease, easement or right-of-way would be valid without the consent of the Federal Government?

A. No, I have not any such case in mind.

Q. Just to be sure the record is straight, then, your answer is that you do not know of any case where the Federal Government was asked to approve a lease, easement or right-of-way, and replied that the lease, easement or right-of-way would be valid without its consent?

A. No, I do not know of any such case.

Mr. Lazarus: No more questions.
Mr. Hobbs: I have one or two.

Redirect examination.

By Mr. Hobbs:

Q. Mr. Manley, do you know of any case where that issue that Mr. Lazarus just called to your attention was ever presented to the Federal Government?

A. No, I do not recall that either.

Q. Do you know of any case—I call your attention to Exhibit 229—where the representatives of the Secretary of Interior stated they had no jurisdiction?

A. Yes. Of course that is Exhibit 229. And also that [fol. 5286] last photostat that was put in concerning the problem of Canadian Tuscaroras was answered in a similar fashion.

Q. Was that the letter of February 24, 1941?

A. That is the one I have in mind.

Mr. Hobbs: Thank you. That is all.

Further redirect examination.

By Mr. Rosenman:

Q. Mr. Manley, as you used the word "guardianship" in your affidavit at page 23, did that mean that the Department of the Interior would possibly pass upon questions submitted to it, or what did you mean by that?

A. Well, I think what that was intended to imply was a general and consistent course of protecting the Indians, such as the Department of the Interior displays toward some of the western reservations.

Q. And does guardianship as applied to those reservations mean an active affirmative interest in what is going on?

A. It does.

Q. And would that imply that the Department of Interior would affirmatively search out to see whether these various transactions that I referred to this morning were taking place?

A. It is my understanding that the Department of the Interior interests itself in every person who is living on the reservation, and if persons are living there who should [fol. 5287] not be there, they take appropriate steps.

Q. And this is without waiting for some question to be submitted to it for approval, is that right?

A. That is the usual form of guardianship.

• • • • • • •

[fol. 5289] OFFER IN EVIDENCE

Mr. Rosenman: I would like to offer in evidence a photostat of a letter from the Department of Interior, addressed to Robert Moses, Chairman of the Power Authority. It seems to be without date. It is stamped "Received October 7, 1957". We will have to furnish—

Presiding Examiner: Do you wish that marked as an exhibit?

Mr. Rosenman: Yes, sir, in evidence, please.

Presiding Examiner: Rather than mark it as an exhibit, [fol. 5290] Judge, since you do not have copies, why don't you just read it into the record?

Mr. Rosenman: All right.

This is a letter on the letterhead of the United States Department of the Interior, Bureau of Indian Affairs,—Realty Review and Liaison—addressed to Mr. Robert Moses, Chairman, Power Authority of the State of New York, 270 Broadway, New York 7, New York.

"Dear Mr. Moses:

"The Secretary of the Interior has received a communication signed by the Chiefs of the Tuscarora Indian Nation, in which protest is made that the New York State Power Authority is attempting to obtain several hundred acres of Indian lands for a storage project.

"Although jurisdiction over these Indians has passed from the Federal Government to the State of New York, this Bureau, as well as the Department, is interested in their economic welfare.

"It has been our understanding that no Indian lands were involved in Project No. 2216, located on the Niagara

River. However, in view of this protest by the Chiefs, we shall appreciate receiving information concerning this storage reservoir, and whether or not it is contemplated that any Indian lands will be taken.

[fol. 5291]

"Sincerely yours,

/s/ "W. Bartan Greenwood
"Commissioner."

* * * * * * *

[fol. 5294] Lawrence L. Ketchen resumed the stand and testified further as follows:

* * * * * * *

[fol. 5300] Mr. Hobbs: Mr. Examiner, the Item I by reference is the reservoir referred to, I believe, in that part of Item III just read, and that appears on page 36, 30,000 acre feet capacity.

Presiding Examiner: That was the report prepared by the Corps of Engineers and the Federal Power Commission and the Power Authority of the State of New York, and is contained in Senate Document No. 113 of the 84th Congress.

Mr. Hobbs: That is correct, and that was prepared prior to the Schoellkopf disaster.

* * * * * * *

[fol. 5335] Mr. Lazarus: * * * I have here, Your Honor, a letter under the letterhead of the United States Department of the Interior, Office of the Secretary, Washington 25, D. C., dated January 4, 1954, addressed to the Speaker of the House of Representatives and signed by Assistant Secretary of the Interior, Orme Lewis, who was then the Assistant Secretary who had jurisdiction over the Bureau of Indian Affairs.

* * * * * * *

[fol. 5339]

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

January 4, 1954

My dear Mr. Speaker:

There are transmitted herewith drafts of two proposed bills, one "To provide for the capitalization of the treaty annuity paid to the Six Nations of Indians, and for other purposes", and the other "To provide for the distribution of funds belonging to the Seneca Nation and the Tonawanda Band of Senecas, and for other purposes".

The proposed bills are submitted in response to House Concurrent Resolution 108, 83d Congress, 1st Session, which included a request for legislative recommendations with respect to the Indian tribes and individual members thereof located in the State of New York. It is requested that the proposed bills be referred to the appropriate committee for consideration.

We are also enclosing a copy of factual background material which we believe will be of assistance in consideration of the proposed bills.

With the exception of two small trust funds, the principal obligations of the Federal Government to the Indians of New York are as follows:

[fol. 5340] (1) The payment of their share in the perpetual annuity of $4,500 established by the treaty of November 11, 1794 (7 Stat. 44), between the United States and the Six Nations;

(2) the obligation to protect their use and occupancy rights to land, based on the treaty of November 11, 1794, supra, and the treaty of May 20, 1842 (7 Stat. 586), between the United States and the Seneca Nation;

(3) the annual distribution of $6,000 to the Seneca Indians pursuant to the Act of February 19, 1831 (4 Stat. 442); and

(4) certain other responsibilities based on statutes of the United States that are applicable to Indian tribes and individual Indians because of their status as Indians.

The perpetual annuity of $4,500 was established by Article VI of the treaty of November 11, 1794, which provides that the money shall be expended "in purchasing clothing (sic), domestic animals, implements of husbandry, and other utensils * * * and in compensating useful artificers." The annuity is presently distributed as follows:

(1) $1,800 of the annuity is apportioned to the Oneida Indians of Wisconsin. Prior to 1952, this sum was distributed per capita among the Indians by the Secretary of the Interior. The last two annual payments have, however, been tendered to the tribe for distribution by the tribe [fol. 5341] rather than by the Secretary, and the tenders have been refused.

(2) The remaining $2,700 of the annuity is used to purchase cloth, which is delivered by this Department to a representative of each tribe in New York that is entitled to share in the annuity. The cloth is then distributed among the members of the tribe by this representative.

One of the proposed bills authorizes an appropriation for a lump sum payment of $150,000, based on a capitalization at 3 per cent interest of the $4,500 treaty annuity, but the payment to each Indian group will be made only with the consent of that group. The proposed bill further provides that a proportionate share of the annuity shall continue for those Indian groups that do not accept their share of the lump sum payment.

It should be pointed out that capitalization of this annuity is vigorously opposed by the Indian recipients, who place a high symbolic value on the continued affirmation of their historic treaties with the United States. In New York, the Indians further consider the presentation of the cloth by the Federal Government as a continuing Federal recognition of their land rights. Under the authority of the Act of April 30, 1908 (35 Stat. 73), the Bureau of Indian Affairs of this Department attempted unsuccessfully in 1951 to negotiate a settlement of the treaty annuity on essentially the same

[fol. 5342] terms as those contained in the proposed bill. Prior to final formulation of this proposed bill, representatives of the Bureau of Indian Affairs again consulted with the various Indian groups affected in order to obtain their preliminary views and to determine if any workable alternative proposals might be acceptable. In each meeting the Indians opposed any action toward settlement of the annuity and indicated they would reject any formal offer by the Congress at this time.

Nevertheless, it is our belief that the enactment of the proposed bill will provide an orderly procedure under which this obligation can be terminated in an equitable manner, and will constitute a firm standing offer to each Indian group if the prevailing attitude should change.

With respect to the treaty obligation to protect the use and occupancy rights to lands of the Indians, we believe that most of the legal questions involved have been settled in previous litigation, but no practical method of terminating the obligation of the United States appears possible or desirable at this time.

This proposed bill also makes inapplicable to the Indians in the State of New York all laws of the United States, with certain exceptions, the effect Indians because of their status as Indians. The principal effect of such action will be to remove the remaining restrictive measures requiring the consent of the Federal Government to leases, contracts, and [fol. 5343] other actions by the tribal governing bodies. Such restrictions are no longer needed. The excepted Federal statutes that will continue to be applicable relate to the civil and criminal jurisdiction of the State of New York over the Indians and their property, to the leasing of Indian lands in New York, and to the application of State game and fish laws on some of the reservations.

The other proposed bill affects only the Seneca Indians of New York. The bulk of the Senecas are members of the Seneca Nation, but a small group, which has been separate since 1848, is known as the Tonawanda Band of Senecas. The proposed bill is concerned with the disposition of two small trust funds requiring legislative action, and with the

capitalization at 3 per cent interest of the $6,000 now distributed per capita annually to the Senecas. The handling of these funds represents most of the administrative work now being done for all the Indians of New York. The enactment of the proposed bill will result in the distribution of the funds in an equitable manner, and in desirable administrative economies. In this regard, it should be pointed out that the New York Agency of the Bureau of Indian Affairs was abolished in 1949, and the remaining responsibilities are now handled in Washington.

Since these obligations are based on existing statutes, rather than on treaties, no specific provisions for Indian consent to their modification are included in the proposed bill. In recent consultations with the two Seneca groups, the [fol. 5344] Indians did not take any formal position with respect to these proposals, and requested additional opportunity to study them, with the understanding that they would make their views known to the Congress when these matters are under consideration.

The Senecas did indicate, however, that they will strongly oppose disposition of these funds if the proposal is tied to any measures affecting the treaties between the United States and the Six Nations, which include the Senecas. It is, therefore, in accordance with their wishes that the Department's recommendations are embodied in two separate bills, the second of which is concerned only with the disposition of these Seneca funds. We believe that it is important that there be no confusion in the minds of the Indians concerning the nature and purpose of the proposals, in order that each proposal may be considered on its own merits.

Neither of the proposed bills would affect any existing relationships between the State of New York and the Indian groups located within its borders. State officials with whom the proposals were discussed indicated that they saw no objection to enactment of the proposed bills.

Because of the request that the views of the Department be submitted not later than January 1, 1954, this report has not been cleared through the Bureau of the Budget and, therefore, no commitment can be made concerning the re-

lationship of the views expressed herein to the program of the President.

[fol. 5345] Sincerely yours,

/s/ Orme Lewis
/t/ Assistant Secretary of the Interior

Hon. Joseph W. Martin, Jr., Speaker of the House of Representatives, Washington 25, D. C.

A Bill

To provide for the capitalization of a treaty annuity paid to Six Nations of Indians, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated the sum of $150,000 for apportionment and distribution by the Secretary of the Interior, in accordance with the provisions of section 2 of this Act, among the enrolled members of the tribes that have been receiving the benefits of the annual appropriation of $4,500 under Article VI, of the Treaty of November 11, 1794 (4 Stat. 44), between the United States and the Six Nations: Provided, That no payment shall be made to any tribe until the tribe agrees to accept the payment in lieu of its share of the annuity provided for in Article VI of said Treaty, and upon acceptance of such payment by a tribe the annuity provided for in such Article VI shall be reduced by the amount of such [fol. 5346] tribe's share in the annuity: Provided further, That nothing contained in this section shall be construed as abrogating said treaty, or as changing any provision of said treaty except the provision for a perpetual annuity, or as changing any other treaty between the United States and the Six Nations.

Sec. 2. The funds authorized to be distributed by section 1 of this Act shall be apportioned by the Secretary of the Interior among the tribes entitled thereto on the same basis that is used for the apportionment of the annuity referred to in section 1 of this Act, and shall be distributed

by the Secretary of the Interior per capita among the enrolled members. Provided, That upon request of any tribe prior to such distribution the Secretary of the Interior shall pay the tribe's share to a properly bonded official of the tribe or other trustee designated by the tribe for use or disposition as the tribe directs.

Sec. 3. All statutes of the United States which affect Indians because of their status as Indians, except the Act of February 19, 1875 (18 Stat. 330, c. 90), the Act of September 30, 1890 (26 Stat. 558, c. 1132), the Act of January 5, 1927 (44 Stat. 932, c. 22), the Act of July 2, 1948 (62 Stat. 1224, C. 809), the Act of August 14, 1950 (64 Stat. 442, c. 707), and the Act of September 13, 1950 (64 Stat. 845, c. 947), shall no longer apply to Indian tribes in the State of New York and members thereof: Provided, That [fol. 5347] nothing in this section shall affect the rights, privileges, immunities, and obligations of such Indians as citizens, or shall authorize the alienation, encumbrance, taxation, or regulation of the use of lands of the tribes in a manner inconsistent with any Federal treaty or agreement or regulation made pursuant thereto.

Sec. 4. Nothing contained in this Act shall serve to abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved.

Sec. 5. Nothing in this Act shall affect any claim heretofore filed against the United States by any tribe.

Sec. 6. The Secretary of the Interior is authorized to issue rules and regulations necessary to effectuate the purposes of this Act.

A Bill

To provide for the distribution of funds belonging to the Seneca Nation and the Tonawanda Band of Senecas, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated

the sum of $200,000 for apportionment and distribution by the Secretary of the Interior, in accordance with the provisions of section 4 of this Act, among the enrolled members of the Seneca Nation and the Tonawanda Band of [fol. 5348] Senecas. The Act of February 19, 1831 (4 Stat. 442), is hereby repealed effective as of June 30, 1954.

Sec. 2. The Secretary of the Interior is hereby authorized and directed to apportion and to distribute, in accordance with the provisions of section 4 of this Act, among the enrolled members of the Seneca Nation and the Tonawanda Band of Senecas any funds remaining in the "Senecas of New York Fund", or interest accrued thereon, held in trust for said tribes in accordance with the provisions of the Act of March 3, 1909 (35 Stat. 800).

Sec. 3. The Secretary of the Interior is hereby authorized and directed to distribute per capita among the enrolled members of the Tonawanda Band of Senecas who have not received their pro rata shares of tribal or trust funds distributed under the Act of March 2, 1907 (34 Stat. 1221), the balance of the "Seneca Tonawanda Band Fund" and the interest accrued thereon held in trust for the band under the Act of April 1, 1880 (21 Stat. 80).

Sec. 4. The funds authorized to be distributed by sections 1 and 2 of this Act shall be apportioned by the Secretary between the Seneca Nation and the Tonawanda Band of Senecas on the basis of enrolled membership, and shall be distributed by the Secretary per capita among the enrolled members: Provided, That upon request of either tribe prior to such distribution the Secretary shall pay the tribe's share to properly bonded official of the tribe or other trustee designated by the tribe for use or disposition as the tribe may direct.

Sec. 5. Nothing in this Act shall affect any claim hereto- [fol. 5349] fore filed against the United States by the Seneca Nation or the Tonawanda Band of Senecas.

Sec. 6. The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of this Act.

Background Data on Indians of New York

Foreword

The purpose of this memorandum is to summarize the present status of the Indians in the State of New York, with emphasis on those relationships still existing between the Federal Government and these Indians.

History

The Indians of New York State with whom the Federal Government still maintains some relationships are descendants of the Iroquois Confederacy of Six Nations. These nations, or tribes were the Senecas, Mohawks, Onondagas, Cayugas, Oneidas, and Tuscaroras. The Mohawks, having been allied with the British, withdrew into Canada after the Revolutionary War, but in 1888, the St. Regis fragment of the Mohawks was adopted into the Six Nations in place of the Mohawk Nation.

Various treaties were concluded with the Six Nations, not only by the United States, but also by the State of New York and by private individuals under the supervision of Federal agents. Efforts were made to relocate the Indians in the West, and many of the Senecas and Cayugas moved to [fol. 5350] Oklahoma, while the main body of the Oneida tribe located in Wisconsin.

Present Population and Reservations

At the present time the Seneca Nation is largely located on two reservations, Allegany and Cattaraugus, with a third small reservation, Oil Springs, leased to non-Indians. Another group, the Tonawanda Band of Senecas, broke with the main Seneca Nation around 1848, and now forms a group with a separate reservation and with a completely separate tribal government. The Cayugas and Oneidas remaining in New York have no separate reservation. However, the great majority of the Cayugas now live on the Cattaraugus Reservation, while most of the remaining Oneidas reside with the Onondagas on the Onondaga Reservation. The Tuscarora and the St. Regis Reservations bring the total number in New York to six.

The most recent population figures for each tribe or band are as follows:

Tribe	*Population*
Cayuga	237
Oneida	369
Onondaga	744
St. Regis	1,865
Seneca Nation	3,337
Tonawanda Band of Senecas	690
Tuscarora	452

[fol. 5351] *Land Status*

The various reservations within the State have the following acreages:

Reservation	*Acreage*
Allegany	30,469
Cattaraugus	21,680
Oil Springs	640
Onondaga	6,100
St. Regis	14,640
Tonawanda	7,549
Tuscarora	6,249

None of this reservation land in New York has been allotted to individuals in severalty under Federal statutes, and the dominant title is still in the tribes. No individual land records are maintained, although nearly all of the reservation lands are claimed and occupied by individual Indians under tribal customs.

The United States has never held title to any of the Indian reservations in the State of New York. No attempt will be made to give in detail the historical and legal background of each reservation, but, in brief, the titles are held as follows:

St. Regis Reservation
Onondaga Reservation — Fee title is in the State of New York with equitable title or use and occupancy right in the Indians.

[fol. 5352] Tonawanda Reservation Fee title is in the comptroller of the State of New York "in trust and in fee for the Tonawanda Indians."

Tuscarora Reservation Fee title to all but 1,920 acres is held directly by the Tuscarora Tribe by deed of conveyance from the Secretary of War, of record in Niagara County Clerk's office. The 1,920 acres is in the same status as lands of the Seneca Tribe, dealt with below.

Allegany Reservation
Cattaraugus Reservation In litigation dealing with the locus of title in these two reservations, title has been variously described. For example, the first litigation seemed to indicate that the title was in the Indians with Ogden Land Company and its predecessors having only a "preemptive right" or right to purchase if the Indians chose to sell. However, the weight of authority is that the ultimate fee title to the reservation land is in the Ogden Land Company, with the Indians having an indefeasible right of occupancy and possession. This also applies to the 1,920 [fol. 5353] acres of the Tuscarora Reservation mentioned above.

Oil Springs Reservation Contains only 640 acres. Not occupied by any Indian but claimed by Seneca Tribe. Indians claim it was reserved to them when they relinquished claim to surrounding land, but such a reservation does not appear in any treaty or land contract. The Indians contested right of a non-Indian to possession of this land and prevailed in the litigation. Since that time the tribe has rented the land to non-Indians.

The State of New York has a comprehensive Code of Indian Law, and for many years has furnished the Indians with such community services as health, welfare, and education. The Act of July 2, 1948 (62 Stat. 1224), and the Act of September 13, 1950 (64 Stat. 845), conferred criminal and civil jurisdiction, respectively, upon the State in all matters affecting the Indians.

Remaining Responsibilities of Federal Government

The treaty obligations of the Federal Government with respect to the reservation lands in New York are contained in the treaty of November 11, 1794 (7 Stat. 44; II Kappler 5), with the Six Nations and the treaty of May 20, 1842 (7 Stat. 586), with the Seneca Nation, in which the United [fol. 5354] States agreed to protect the Indians in the free use and occupancy of their lands. Discharge of this obligation usually means furnishing legal assistance through the Department of Justice in litigation affecting the use or occupancy of these lands.

The other remaining obligations or responsibilities which the Federal Government still has to the New York Indians are:

(1) Furnishing $4,500 worth of cloth and cash annually, under the treaty of November 11, 1794, supra, with the Six Nations, to all the Indians listed previously except the St. Regis group. The Oneida Indians of Wisconsin also participate in it, but take their share, amounting to $1,800, in cash. The present membership of Oneida Tribe is approximately 3,600.

(2) Distributing $6,000 annually to the Seneca Indians, both the Seneca Nation and the Tonawanda Band, under the Act of February 19, 1831 (4 Stat. 442, c. 6). This payment is not based on a treaty obligation, but resulted from a contract in 1797 between Robert Morris and the Senecas for the sale of a tract of land for $100,000. The money was invested in the United States Bank at 6 per cent interest, but by the Act of February 19, 1831, supra, it was credited to the Indian Appropriation Act, with the provision that $6,000 should be paid annually thereafter to the Seneca Tribe. In 1952 this payment amounted to $1.48 per capita.

[fol. 5355] (3) Making an annual distribution to certain members of the Tonawanda Band of Senecas representing interest earned on tribal trust funds on deposit in the United States Treasury. Each member who has not received a pro rata share of this trust fund is entitled to participate. For fiscal year 1952, 280 members of the band each received

$1.42. The trust funds in the Treasury for this band amounted, as of June 30, 1953, to $11,244.90. Another fund of $1,938.64 in the Treasury is credited to the Senecas of New York, and represents unpaid shares on a distribution of tribal moneys in 1909.

(4) Approving contracts between the tribes and attorneys. A number of claims have been filed under the Act of August 13, 1946 (60 Stat. 1059), by the Six Nations as a group and by individual tribes.

(5) Certain other responsibilities based on general statutes of the United States applicable to all Indian tribes and the members thereof because of their status as Indians.

Efforts to Terminate Federal Responsibilities

In recent years there has been considerable efforts to terminate Federal responsibilities to the New York Indians. Under the two acts which were referred to previously, criminal and civil jurisdiction was transferred to the State of New York. An Act of August 14, 1950 (64 Stat. 442), re- [fol. 5356] lieved the Bureau of Indian Affairs of responsibility for handling the leasing of town lots. In 1949, the New York Indian Agency was closed, and the few remaining responsibilities were transferred to the Washington office of the Bureau.

In December 1951, representatives of the Commissioner of Indian Affairs visited the various New York tribes who share in the annuity from the treaty of 1794, to discuss the possibilities of commuting this annuity, with a tentative proposal of capitalizing the payments at 3 per cent interest. Authority for such negotiations is contained in the Act of April 30, 1908 (35 Stat. 73), with any such agreement subject to the approval of the Congress.

At meetings with the various tribal councils, and a general meeting with the Cayugas, who have no tribal government, the proposal for commutation was flatly rejected by every group, usually by a unanimous vote. The Indians stated that the symbolic value of the cloth rather than its monetary or material value was the important factor and that the annual cloth distribution was a symbol of the Federal Government holding faith with the treaty provi-

sion, for continuing peace and friendship between the United States and the Six Nations. While they understood that commutation of Article VI of the treaty, which provides for the annuity, would not abrogate the entire treaty, they were opposed to any action which might change existing relationships.

* * * * * * *

[fol. 5364] VIOLA HEWITT was called as a witness and, after being first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 5381] Cross examination.

By Mr. Rosenman:

Q. I understand, Mrs. Hewitt, that you do not live in this house shown on picture No. 2409, is that correct?

A. Yes.

Q. Where do you live?

A. I live just beyond the area that the State Power Authority wants.

Q. And who owns the house in which you live?

A. We do; my husband and I do.

Q. Did you buy the house from some other member of the tribe, the house in which you live?

A. No. It was handed down from his grandfather.

Q. Is your husband a member of the Tuscarora Nation?

A. Yes.

Q. And are you?

A. Yes.

Q. He inherited the house in which you live from his grandfather?

A. Yes.

Q. And did you inherit the house in picture No. 2409 from your parents?

A. No. We bought that from another member of our tribe. We do that quite often.

Q. Who was the member of the tribe from whom you bought it?

[fol. 5382] A. I bought that from one of my boys, one of my sons.

Q. And where did your son get it?

A. From one of the neighbors there.

Q. Did he pay for it? Did he buy it from one of the neighbors?

A. Yes.

Q. Do your remember the neighbor's name?

A. Yes, I do.

Q. What was it?

A. Clyde Jacobs.

Q. Now where did Mr. Jacobs get it from? Did he inherit it?

A. He built the house.

Q. And where did he get the land? Did he inherit the land?

A. No. He bought the land from some other member of the tribe. I don't know just who.

Q. When he bought the land, it was vacant and then Mr. Jacobs built this house which is shown in picture No. 2409, is that correct?

A. Yes.

Q. And then your son bought it from him?

A. Yes.

Q. What was your son's name?

A. Elvis.

[fol. 5383] Q. Elvis—

A. Hewitt.

Q. —Hewitt.

Then he sold it to you?

A. Yes.

Q. Now what did Elvis do? Had Elvis lived in this house?

A. No, he did not. He had rented that out and then we bought it off of him.

Q. He rented it to a Tuscarora member?

A. Yes.

Q. And where did he live after he rented it?

A. Well, he never did live in that house. He has another place of his own, but he bought the house.

Q. He bought it for an investment to rent out to people?

A. Not really. Usually if we wanted to purchase something or were sick and couldn't afford anything, why, to

pay for things sometimes we sold lands or anything like that among ourselves.

Q. But when your son Elvis bought this house, he was already living in another house on the reservation, wasn't he?

A. Yes.

Q. And as soon as he bought it, did he rent it to someone?

A. Yes.

[fol. 5384] Q. Now, then he sold the house to you, is that correct?

A. Yes.

Q. And what did you do with the house? Did you ever live in it?

A. No.

Q. Did you continue renting it to the same family that Elvis did, or did you rent it to some other family?

A. No. The family moved out and we rented it to my oldest son.

Q. You rented it to your oldest son?

A. Yes.

* * * * * * *

[fol. 5389] Q. Now, you have, therefore, two sons who are married?

A. Yes.

Q. Everett is one. What is the name of the other?

A. Elvis.

Q. Elvis?

A. Yes.

Q. Where does he live now?

A. On Walmore Road.

Q. Did he buy his house from someone?

A. Yes.

[fol. 5390] Q. How long ago, do you know?

A. Oh, about eight years ago, I think. He was quite young when he bought it for himself.

Q. And he lives there with his family.

Now, your three daughters. Are they all married that live on the reservation?

A. Yes, they are married.

Q. Did their husbands—did they buy the houses in which they live?

A. No. My youngest daughter bought a little house from us. She lives right close to us.

Q. She bought a house from you?

A. Yes.

Q. Where had you gotten this house from?

A. We built it.

Q. You built it on the land that you owned?

A. Yes.

Q. Did you get any money from the tribe for building it?

A. No.

Q. You built it out of your own money or your husband's money?

A. Yes.

Q. Now, the other two daughters where did they get their houses from?

[fol. 3291] A. From different families. As I said before, how we purchased this little house that my oldest son is living in.

Q. Your two daughters bought their houses from other members of the nation?

A. Of the tribe, yes.

Q. And is this generally done on the reservation? Do people buy and sell houses to each other?

A. Yes. Within the tribe, yes.

Q. They only do it to members of the tribe, is that correct?

A. That is right.

Q. Now, when you sell a house, Mrs. Hewitt, and get money for it, and sell land on which the house is built, and get money for it, does any of that money go to the nation?

A. No. I don't think so. I didn't give any of it to the nation myself.

Q. Did the nation ever ask you for any of it?

A. No.

Q. Now, I think you said, in an answer to Mr. Hobbs, that when a member of the tribe dies, his land goes to his children.

A. He didn't ask me that question.

Q. I beg your pardon?

A. He didn't ask me that question.

Q. Well, then let me ask you. What happens to this [fol. 5392] property if the member that owns it dies, does it descend to his children?

A. Yes.

Q. If a member has a house and has more than one child, what happens then?

A. Well, if there are two or three children—

Mr. Lazarus: I object, Your Honor, these are questions of law.

Mr. Rosenman: These are questions of tribal questions, not questions of law.

Mr. Lazarus: We haven't qualified this witness to discuss tribal questions.

Mr. Hobbs: Mr. Examiner, there is an example of what I made reference to a few minutes ago. It is another example of trying to play hide and seek here for the record.

Mr. Lazarus: This is an example of dilatory tactics, if it is an example of anything.

Presiding Examiner: The objection is overruled.

By Mr. Rosenman:

Q. Can you tell us, Mrs. Hewitt, what happens if a member of the nation owns a house and some land, and has as large a family as yours? To whom does it go?

A. Well, that I couldn't answer, because each one has their own way of settling their properties and so forth.

Q. Well, do you mean that you leave it by means of a [fol. 5393] will or some kind of an instrument?

A. Yes.

Q. For example.

A. We have our chiefs to settle the estate.

Q. For example, when you inherited your house, when your husband inherited the house where you and he now live, did he have any brothers and sisters at the time his father died, or his mother died, when he inherited the land?

A. You mean did my husband have—

Q. Brothers or sisters?

A. Yes.

Q. And how was the estate divided between his brothers and sisters, and himself? How was the property that he was left, how was it divided? Did somebody divide it or was there a will?

A. No, his grandfather gave that right out for him to us.

Q. Oh, his grandfather gave it to him before his grandfather died?

A. That is right.

Q. I see.

Did he sell it to him or give it to him?

A. Well, there was some little deal there about it. I don't really understand what it was. But I would say that he didn't buy it right out to sell it to him, I mean. He gave him some wood and stuff like that, because he was disabled.

* * * * * * *

[fol. 5414] Mr. Hobbs: I have one or two questions I would like to ask.

Presiding Examiner: All right.

Let me ask her a question or two.

Mrs. Hewitt, when you buy one of these houses, do you get a piece of paper that goes with it?

Do you know what a deed is?

The Witness: Yes.

Presiding Examiner: Do you get a deed to it?

The Witness: Yes.

Presiding Examiner: A written piece of paper?

The Witness: Yes.

Presiding Examiner: Have you got such a deed with you now?

The Witness: No

Presiding Examiner: What does the deed say? Do you recall that?

The Witness: Well, it states who the party was that owned the place and the boundary lines and—

Presiding Examiner: Describes the land, does it?

The Witness: Yes.

Presiding Examiner: And does that deed—what does it [fol. 5415] say? What else does it say on it?

The Witness: Well, it states how much you paid for the place or how you purchased it from the former owner.

Presiding Examiner: And who signs it?

The Witness: The party that bought the place.

Presiding Examiner: Are you sure the buyer signs it or does the seller sign it?

The Witness: The seller signs it.

Presiding Examiner: The seller signs it?

The Witness: Yes.

Presiding Examiner: And does his wife sign it, too?

The Witness: Yes.

Presiding Examiner: Both the husband and the wife sign it if you are buying it from a man and his wife?

The Witness: Yes.

Presiding Examiner: Do you take it down before a notary public and have it sworn to?

The Witness: We take it to the—well, we took ours to the chief.

Presiding Examiner: You have it sworn to before one of the chiefs?

The Witness: Yes.

Presiding Examiner: Then after you get this deed, then what do you do with it?

The Witness: We keep it in our possession.

[fol. 5416] Mr. Grossman: Speak up, Mrs. Hewitt.

Presiding Examiner: Do you take it any place to have it recorded?

Do you know what I mean by having it recorded?

The Witness: Yes. Yes, I do know.

Well, we didn't.

Presiding Examiner: Well, you understand that it isn't necessary to have it recorded except as a matter of public record or tribal record?

The Witness: Well, we settle with our chiefs.

Presiding Examiner: That is what I mean. The deed do you take it to some one of the chiefs who keeps the record of the land and ask him to record it for you in the tribal books?

The Witness: Yes.

Presiding Examiner: And did you do that with your deeds?

The Witness: Yes.

[fol. 5418] Cross examination.

By Mr. Lazarus:

Q. Mrs. Hewitt, you were asked a lot of questions about deeds and going to the chiefs in procedures in the tribe for transferring land. Tell me, are you an expert in tribal customs?

A. No, I could not say I am.

[fol. 5439] Colloquy

Mr. Lazarus: Your Honor, I would like to have you take judicial notice of a document which is labeled "Legislative Document (1958) No. 57 State of New York Special Legislative Committee on the Revision and Simplification of the Constitution Inter Law School Committee Report on the Problem of Simplification of the Constitution Staff Report No. I. May 1958."

This is an official publication of the New York State Legislature. I would like to read into the record a few passages from this document which deals with the New York State Constitution.

As you may be aware, there is a provision in the New York State Constitution dealing with Indian lands, and this document, which is a recent pronouncement on the subject, I think has particularly important things to say in the light of remarks made by counsel for the Power Authority yesterday with respect to the effect of 25 U.S.C. 177. I would like to just read brief portions of this into the record, asking you to take judicial notice of the whole thing.

[fol. 5448] Mr. Lazarus: At page 33 of this document there is a discussion of Indian lands with respect to Article I, Section 13, of the New York Constitution, which states:

"No purchase or contract for the sale of lands in this state, made since the 14th day of October, one thousand seven hundred seventy-five; or which may hereafter be

made of, or with the Indians, shall be valid unless made under the authority, and with the consent of the Legislature."

Now, the problem under consideration is whether this article should in any way be changed in the New York Constitution.

On page 34 there starts a paragraph as follows:

"The impact of Article I, Section 13, has almost from the [fol. 5449] first been qualified by the Federal Government's overriding powers with respect to Indian lands. New York's Indian tribes, unlike those of most other states, are not settled on lands that were once part of the national domain."

Here I am omitting footnotes.

"Even so, the authority of the Federal Government is far-reaching. The United States Constitution, Article I, Section 8, confers power on Congress to regulate 'commerce with the Indian tribes' and the treaty-making power of the National Government extends to agreements with the Indian tribes. Moreover, the Supreme Court has repeatedly recognized a pervasive Federal power to deal with tribal Indians without reference to specific Constitutional provisions; the history of Indian negotiations with Federal representatives and the status of the tribes as 'wards' of the United States have led to the view that the National Government possesses in effect 'a new power, a power to regulate Indians.'

"By treaties executed in 1784, 1789 and 1794, the National Government has sought peace with the Indians of Western New York in return for promises that the tribes would be [fol. 5450] secured in their possession of large areas of land defined in the several treaties. And in 1790 Congress enacted the first of a series of laws providing, in essence, that sales of Indian lands could be made only with Federal approval. These Federal restrictions on alienation of tribal property have continued to the present day."

Then there is a brief discussion of a conflict between the state and the Federal Government at in early days on who had jurisdiction. And on page 36 we find this quote:

"As the years passed, however, Federal power over Indian lands grew and state power waned. New York statutes

that affected Indian lands were invalidated by both state and Federal courts. Toward the close of the 19th Century, the New York courts felt able to declare flatly that 'Indians are treated as wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquitted by conveyance or lease from them.'"

Then we carry through with a further analysis of the Constitutional Convention in 1915 with, on page 37, this quote:

"The Attorney General of New York, for example, unequivocally ruled in the very year the Convention met that [fol. 5451] Congressional power over Indians was exclusive, and that a state could not act even in the absence of conflicting Federal legislation."

I point out it is the state that cannot act.

Then there is a discussion of the Forness case and the statutes passed in 1948 and 1950 to which reference has been made.

On page 38 appears the following:

"Most significantly, however, the New York proponents of the legislation insistently maintained that the status of the reservation lands would in no way be affected. The legislative history is replete with indications of an intent not to enlarge state power over tribal lands, nor to transfer Federal guardianship over them. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts Indian reservations from state and local taxation, and that negatives any authorization of the 'alienation from any Indian nation, tribe, or band of Indians of any land within any Indian reservation in the State of New York.'"

There follows the key paragraph in this report which deals specifically with the powers of the state, naturally including condemnation:

"The upshot of the matter is that for the first time in [fol. 5452] over 150 years a confident and comprehensive statement may now be made concerning state and Federal power over Indians on reserved land in New York. Today

New York has authority to apply its laws to occurrences on the Indian reservations. But it cannot decide whether or not the tribal lands may be or must be conveyed to non-Indians. This remains within the sphere of Federal power."

* * * * * * *

[fol. 5464] Mr. Lazarus: The first witness is Mr. Ketchen, Lawrence Ketchen whose testimony except for his opening remarks and some part of the cross-examination was de-[fol. 5465] voted to alternative reservoir sites and costs. I have marked down pages 3984 to 4,009, 4,011, line 12 to 4,022, line 17, 4,027, line 2, to 4,031 and 4,041 to 4,048, all of this relating to alternative reservoir sites.

In addition, there were five maps admitted into evidence during the course of his testimony, the first map being Exhibit 161, and that being the proposed reservoir site which affects Tuscarora lands.

I, of course, have no objection to that. But 161, 163, 164, and 165 deal with alternative reservoir sites which I believe are not before the Commission and therefore are irrelevant, and I move that his testimony as I just indicated and these four exhibits be stricken on grounds of irrelevancy.

As I have said, the alternative sites, acquisition costs, et cetera, have nothing to do with the issue remanded to the Commission for consideration by the Court of Appeals, which is strictly whether the proposed reservoir as shown in the Exhibit J map—or rather reversing it—yes, whether it is consistent or will interfere with the purpose for which the reservation was created and acquired.

Whether there are alternative sites has nothing to do with that issue.

Presiding Examiner: We have, as I said before the noon recess, you and I have not seen eye to eye on that subject, and at this time I will overrule your motion to strike the [fol. 5466] testimony of that witness and those exhibits, and then at the end of your motion, I will comment at some length on what I think, what this Examiner thinks that the Circuit Court of Appeals had in mind when they remanded it down here.

* * * * * * *

[fol. 5471] Mr. Lazarus: During the course of Mr. Patterson's testimony, two exhibits were introduced into the record, 186 and 187. There was also discussion of five others, but they were introduced later. 186 and 187 are newspaper clippings. They were allowed in for the purpose—well, they were offered for one purpose and as I understand it, allowed in for another.

If I understand the remarks of Counsel for the Power Authority, they were offered in terms of showing the pat-
[fol. 5472] tern of dealings between the Power Authority and the Tuscarora Indians and their primary purpose was to show—I believe the phrase was "common knowledge" with respect to the need to use Tuscarora lands back in 1947, and this was intended to be a form of legislative history.

Now in that respect, newspaper clippings, as I mentioned before, particularly from Niagara Falls newspapers, which never even come to the attention of members of Congress, newspaper clippings are not legitimate legislative history. They are not competent evidence as proving anything, and therefore, on that ground should be stricken.

I think the Examiner in part agreed with me on that. At least the indication was that the clippings were admitted into evidence for the purpose of refreshing the witness' recollection.

Now such being the case, they need not be in evidence. They need only have been given an identification number.

Secondly, as soon as they were admitted in evidence, the witness was dismissed, and when he was called back on the stand a few days later, he was not asked any questions about these newspaper clippings, and if you recall, we had quite a colloquy about whether the witness was entitled to witness fees, and counsel for the Power Authority then said, "We did not ask this witness to come back. As far as we are concerned, he was finally dismissed."

[fol. 5473] Therefore, the exhibits were obviously not useful for the purpose of refreshing the witness' recollection because they were never used for that purpose, and I move that they be stricken—that is 186 and 187—on the grounds in the alternative that I have mentioned.

Presiding Examiner: Mr. Lazarus, on page 4269 of the transcript you will recall I admitted those two exhibits for the purpose of refreshing Chief Patterson's memory as to certain events that took place at that time, and for that purpose, I still think they are competent, and only for that, to refresh his memory, and they did examine him to some extent on that.

The motion is overruled.

* * * * * * * *

[fol. 5501] Mr. Lazarus: But these exhibits, as I have said, are written documents, and they are the best evidence and they speak for themselves. The documents themselves and the history of the Tuscarora Reservation, and the law relating to Indian affairs in the State of New York, as in the United States, is not the subject of expert testimony. We are not dealing with the law of a foreign country, we are dealing with the laws of the United States and the State of New York. And those are matters which are decided without expert testimony. They cannot be decided with expert testimony.

So that all of the subject matter of Mr. Manley's testimony is, in fact, not the subject for discussion by a purportedly expert witness. So I move that Mr. Manley's testimony be stricken on that ground. And then I move, on a second alternative ground, which is very simply this:

As I have stated, the law cannot be testified to by an expert witness. Expert witnesses are supposed to testify only to facts. On voir dire it became quite apparent that Mr. Manley is nothing but a lawyer. He is, as a matter of fact, a lawyer who has been beaten in the courts on the law. And now he is coming in under the guise of being a historian, to try to get the legal theories which were rejected by the courts into the record as if they were facts. But it has turned out upon examination that Mr. Manley is not a historian, he is not a member of what we would profes- [fol. 5502] sional societies, that is, societies limited to those who make history a business, rather than those who dabble in it, a sort of moonlight historian as the power authority talked about moonlight farmers. This is not what makes an expert witness.

We also have on record the fact that his affidavit was rejected by the trial court in the Western District of New York, and that rejection was affirmed upon an appeal taken by the power authority. So I move that Mr. Manley's testimony be stricken on the second ground that even if we were dealing with a subject on which we could take expert testimony, Mr. Manley, the lawyer who has lost in the courts, is not qualified to give it.

. . . . . .

[fol. 5506] Presiding Examiner: Well, as I recall, some place in the testimony of Mr. Manley I commented that the documents on which he was testifying certainly were the best evidence and spoke for themselves. Because of the different wording in documents at that time, as compared with documents written today, I think that it was appropriate that Mr. Manley should be asked did he have an opinion about them, and if so, what was it, and to that extent it might be valuable or it might be detrimental to the reviewing authorities, because certainly they are going to look at the documents themselves, and use their own best judgment.

Now, they may look to see what Mr. Manley had to say about them, and then I am satisfied that they will, them-
[fol. 5507] selves, make up their own minds as to what the documents say, because certainly they are more learned than I, and they know full well, as Mr. Lazarus and I do, and all counsel before me know, that the documents speak for themselves, and one man's interpretation of them may be completely different from another.

So, to that extent, I admitted his testimony, and I think for that purpose it is still relevant.

So I will let it stay in and overrule your motion.

. . . . . .

[fol. 5509] Mr. Moore: Senator Robert S. Kerr of Oklahoma, Chairman of the Subcommittee of Senate Public Works Committee, which conducted the hearings which led up to the passage of Public Law 85-859, which authorized the Niagara Power Project, and mandated—

Presiding Examiner: Excuse me, Mr. Moore, that is 159, isn't it?

Mr. Moore: 159, yes, sir.

and mandated the Power Commission to issue a license to the New York Power Authority, has, as we understand it, signed a certificate to the effect that Exhibit 191 was submitted to his committee and, in fact, is a part of the records of that committee.

Now, Senator Kerr mailed the certificate from Oklahoma to his office in the Senate on Monday of this week, air mail, and it has not arrived yet. He is expecting it today.

We have a copy of the certificate, with Senator Kerr's authorization, signed by one of his assistants, but the original, signed by him, is not yet available.

I would request that you give the paper I have in my hand, which is the copy, a number with the understanding [fol. 5510] that Senator Kerr's assistant, Mr. Monk, will send the original certificate to you when he obtains it.

I would like to read what the certificate says. It says:

"United States Senate"—

Mr. Lazarus: Before you read it I would like to object to it, so I will get my motion in before what you read gets into the record.

This is a sort of ex post facto legislative history. I think I very carefully pointed out during every objection I made with respect to legislative history that even if we got one, ten, 15 or 25 Senators down here to testify as to what went on, that is not legislative history.

Legislative history is what goes on and is printed in the public records, and a certificate from Senator Kerr is just incompetent on this.

So I object to admitting the certificate.

[fol. 5513] Mr. Lazarus: All right, let it be noted that this comes in over a vigorous objection.

Mr. Moore: Do you wish me to read it, Your Honor?

Presiding Examiner: Read it in the record.

Mr. Moore: "United States Senate—Committee on Public Works—December 4, 1958," and in the upper left-hand corner is a list of names of members of the Committee on

Public Works. The body of the document: "To whom it may concern:

"I certify that I am a duly elected and serving member of the United States Senate and was serving as Chairman of the Subcommittee on Rivers and Harbors-Flood Control [fol. 5514] of the Committee on Public Works, United States Senate, during the Eighty-fifth Congress, First Session; That in such capacity I presided over public hearings on Senate Bill 512 and Senate Bill 1037; That during the course of these hearings and on April 10, 1957, the representative of the Power Authority of the State of New York submitted for the record a brochure entitled 'Power Authority of the State of New York, 26th., Annual Report, January 28, 1957', which brochure was duly made a part of the record but not printed because its contents were principally photographic as appears from a true copy of said brochure attached hereto."

Signed Robert S. Kerr, Chairman, Subcommittee on Rivers and Harbors-Flood Control Committee on Public Works.

Mr. Lazarus: May I ask one or two questions?

Did you prepare that affidavit and sent it out to Senator Kerr in the field for him to execute?

Mr. Moore: I did not.

Wait a minute, I will answer your question fully, however.

Mr. John R. Davison, associated with us, with the Power Authority, a lawyer in Albany, New York, former Solicitor General of the State of New York, worked with, I believe, Mr. Monk of Senator Kerr's office, and the two of them together prepared the certificate. I do not know who did more of it, whether Mr. Davison did or Mr. Monk did. I know [fol. 5515] Mr. Davison made some suggestions. I know, however, that Senator Kerr's own people communicated with them on the phone about it, and that they mailed it out to him.

. . . . . .

Mr. Moore: I certainly did not make any secret about it, I will tell you that. There was no pressure either.

Now there is another document I would like to have marked for identification, and it is a certificate from Mar-

garet R. Beiter, Chief Clerk of the House of Representatives, Committee on Public Works of the House of Representatives, Congress of the United States, Washington, D. C., dated December 8, 1958.

[fol. 5516] And incidentally, we did not ask Senator Kerr, or anyone else, for any opinions in this thing, we merely asked for a statement of fact, something completely different from what you did with Mr. Bennett. We did not ask him to contradict anything he said before, or that any of his other people said before. Something also which is completely different.

Mr. Lazarus: And Mr. Bennett does not feel he ever contradicted himself, and I agree with him.

Mr. Moore: I am sure he should come here and speak for himself if that is the way he feels.

Mr. Lazarus: I object to the introduction of this one, too, Your Honor. This is fake legislative history. It has no place in the record.

Mr. Moore: What did you say it was?

Mr. Lazarus: Fake legislative history.

Mr. Moore: Faked?

Mr. Lazarus: Faked.

Mr. Moore: I cannot do anything about that, Judge, I swear. Now I am a faker—

Mr. Lazarus: I did not refer to you, I referred to the document.

Presiding Examiner: Mr. Moore, you may read this letter into the record too. I understand Mr. Lazarus objects to it, but it will be read over his objection.

Mr. Moore: The letterhead I think I already read, the [fol. 5517] Committee on Public Works—House of Representatives—Congress of the United States—Washington, D. C., with a list of the members of the Public Works Committee in the upper left-hand corner, and the address in the upper right-hand corner, and the date of December 8, 1958:

"To whom it may concern:

"This is to certify that a brochure entitled 'As a Result of the Destruction in 1956 of the Schoellkopf Power Plant

... The Niagara Area Is Faced With an Emergency,' dated July 25, 1957, was submitted by the Power Authority of the State of New York to the Committee on Public Works of the House of Representatives at the hearing on the bill for the construction by the Power Authority of certain works of improvement in the Niagara River for power. That brochure is still a part of the files of the Commission on Public Works of the House of Representatives. A copy is attached hereto. Other brochures were submitted to the Committee.

/s/ Margaret R. Beiter,
Margaret R. Beiter
Chief Clerk"

Now of course the brochure which was referred to in this certificate was Exhibit No. 248.

[fol. 5518] Presiding Examiner: The Examiner has a few comments he would like to make:

In 1950 the Congress ratified a treaty between Canada and the United States concerning the use of the waters of the Niagara River. Following this ratification, many and various bills, containing different proposals, were introduced in both Houses of the Congress for the redevelopment of these Niagara River waters for power purposes.

Hearings were conducted on these bills starting in the first session of the 82nd Congress. At the opening of the first session of the 85th Congress, four bills were introduced. They were S. 512, introduced by Senator Clark, Clark of Pennsylvania; and H.R. 2137, introduced by Mr. Buckley of New York, who is Chairman of the Public Works Committee of the House, is a companion bill to S. 512; also, S. 1037, introduced by Senators Ives and Javits of New York; and H.R. 4294, introduced by Mr. Miller of New York, is a companion bill to S. 1037. These bills were referred to the Public Works Committees of the Senate and the House for consideration. The Public Works Committee [fol. 5519] of the Senate held hearings on April 10, 11, 12, and 13, 1957. Witnesses stressed the urgent need for the speedy development of additional power for the area. A

rockslide on June 7, 1956, had destroyed two-thirds of the Shoellkopf plant of the Niagara Mohawk Corporation, which furnished hydroelectric power for western New York State. The Public Works Committee of the Senate agreed upon S. 2406, a compromise bill, and favorably reported it to the Senate.

In the report of the Senate Public Works Committee on S. 2406 (Senate Report No. 539, dated June 27, 1957, first session of the 85th Congress), page 6, it was said:

" . . . there is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by [among others] the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Shoellkopf station."

These "more recent" studies are reflected by exhibits introduced in this hearing which show that the reservoir proposed by these plans envisioned the taking of Tuscarora Indian lands even though not specifically so stated.

S. 2406 was enacted by both Houses of the Congress and was signed by the President on August 21, 1957, thereby [fol. 5520] becoming Public Law 85-159 and known as the Niagara Power Project.

In Public Law 85-159, the Congress directed the Federal Power Commission to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the U.S. share of the waters from the Niagara River as provided by the 1950 treaty. The Congress also said the Federal Power Commission should, among other conditions, include those deemed necessary and required under the terms of the Federal Power Act.

[fol. 5521] The Federal Power Commission issued a license to the Power Authority of the State of New York but failed to authorize the taking of Tuscarora Indian lands for the reservoir, as planned by the Power Authority, or to make the finding as required by the first proviso in 16 USCA Section 797(e). The Tuscaroras appealed to the U.S. Court of Appeals for the District of Columbia, who,

on November 14, 1958, retained jurisdiction but remanded the matter to the Federal Power Commission to explore the possibilities of making the above findings.

Congress directed the Federal Power Commission to issue the license. Congress did not specify the physical properties of which the project was to consist, or the lands upon which the project works were to be located.

All of these matters were left to the Federal Power Commission. Congress said there should be a hearing before the Federal Power Commission.

In the initial hearing before the Federal Power Commission, alternate reservoir sites were not exhaustively considered. Therefore, in order to make an appropriate finding as to whether or not Tuscarora lands shall be taken for the proposed reservoir, the Federal Power Commission must, from competent testimony, determine if alternate sites are available, the cost thereof, and whether or not the alternate sites, if approved by the Federal Power Com-[fol. 5522] mission, will permit the licensee, the Power Authority, to carry out the mandate of Congress in Public Law 85-159 to utilize all of the United States' share of the Niagara River waters and to produce power as cheaply as possible.

If the Federal Power Commission cannot, from the evidence, make these findings as to an alternate site, then it must, of necessity and in the public interest consider the use of Tuscarora lands for such reservoir site.

It was to explore these possibilities, among others, that the U. S. Court of Appeals for the District of Columbia remanded this matter to the Federal Power Commission for further hearings. To explore fully these possibilities, I have admitted evidence of the kind which, in the opinion of this Examiner, would enable reasonable and fair-minded men to arrive at a fair and just decision, having due regard for the rights of all parties concerned, including the public interest.

Those are some of my reasons for having admitted a lot of the testimony that was admitted.

As counsel before me all know, in proceedings before Examiners of the Federal Power Commission, the rules of evidence are not as strictly construed as they are in Federal courts.

There being nothing further to come before this Examiner in this matter, the hearing is adjourned.

(Whereupon, at 4:00 p.m., the hearing adjourned.)

[fol. 5589] ORAL ARGUMENT BY MR. LAZARUS

The Chairman: Could you give me any examples in answer to Judge Rosenman's argument as to when flooding would be consistent with the uses and purposes of the reservation?

Mr. Lazarus: Skipping from flooding a minute, Your Honor, to the other project facilities, you see Section 4(e) does not relate only to reservoirs. It relates to project facilities, and as I tried to point out in my brief, there are many types of project facilities which create a negligible interference with land.

You can run and they have run a transmission line across the reservation which took up 86 acres of land, and actually they did not need that much. Part of that I suspect is for the dike. But you can run a transmission line across a part of a reservation and not stop people from living there and not stop people from farming or hunting or doing whatever else, growing weeds, if they want to.

This is negligible. I suppose you could put up a power station that took maybe an acre or an acre and a half of land—

The Chairman: Mr. Lazarus, maybe I could save you time. Have you covered that in your brief?

Mr. Lazarus: Yes, I have.

The Chairman: For some reason or other, your copy of your brief did not get to my office.

Mr. Lazarus: Yes, that is in my opening brief, and of course I have filed a reply brief with respect to the legis-
[fol. 5590] lative history.

But to carry forward on that, the Power Authority has cited three cases. I cited two and they came back with three more where there has been some flooding of land.

Now if we examine these cases, the two I cited were the Pelton Dam and Kerr Dam. In both of those instances there was special legislation authorizing the flooding. The three other cases, one also had a special statute which is wholly

consistent with my theory. The other two cases involved the Uintah Utes and the Nenominees, and if we look at the record, we find with respect to the Nenominee that the flooding was with respect to somewhere between 160 and 200 acres of uninhabited forest land.

That is less than one-tenth of one per cent of the tribal holdings on the Nenominee Reservation. That is a matter de minimis.

Commissioner Connole: It is a matter of degree then, is that your point?

Mr. Lazarus: Yes.

Commissioner Connole: It is a matter of whether there was a reasonable interference with or reasonable inconsisteney with the purpose for which the reservation was created.

Mr. Lazarus: I think that is the way we have to read the statute.

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[fol. 5840]

FP-1371

BEFORE FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

ORDER ISSUING LICENSE (MAJOR) AND SUPERSEDING PRIOR ORDER—Issued January 30, 1958

Application was filed August 20, 1956, and subsequently amended, by Power Authority of the State of New York (Applicant), for a license under Section 4 (e) of the Federal Power Act (hereinafter referred to as the Act) and

Public Law 85-159, 85th Congress, approved August 21, 1957 (71 Stat. 401),[1] for proposed Project No. 2216 (Niagara project) to be located on the Niagara River, a navigable waterway of the United States and an international boundary stream, in the County of Niagara, the City of Niagara Falls and the Towns of Niagara and Lewiston—all within the State of New York.

Applicant proposes to construct and operate hydroelectric facilities to utilize all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the February 27, 1950 treaty between the United States and Canada (1 UST 694). The principal project works would consist of the Lewiston generating plant about 5½ miles downstream from the Niagara Falls and the Tuscarora pumping-generating station in the Town of Lewiston; intake works in the Niagara River about 3 miles upstream from the Falls; a pumped-storage reservoir with usable storage capacity of 60,000 acre feet occupying about 2,800 acres of land in the Town of Lewiston; a water conveyance system about [fol. 5841] 4 miles long from the intake to the Tuscarora pumping-generating station; and a water conduit from the Tuscarora plant to the Lewiston generating plant. The project works authorized for construction by this order are described in more detail in finding (2) herein.

In its application, filed August 20, 1956, Applicant proposed that the waterway between the intake and the Tuscarora plant consist of two "cut and cover" conduits[2] over its entire length. Subsequently, by an amendment to its application the Applicant requested authority to con-

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[1] Public Law 85-159 provides in part:

> * * * the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

[2] A "cut and cover" conduit is a waterway constructed by surface excavation of a deep cut in which is constructed a concrete conduit and then the excavation is refilled, covering the conduit.

struct a 7,000 foot section of the waterway at the Tuscarora end as a single unlined open canal in lieu of the two cut and cover conduits as originally proposed. Applicant's plan as amended to include this open canal section is identified in the record as "Plan VI." The City of Niagara Falls, the County of Niagara, and the Town of Niagara, interveners,[3] objected to the waterway as proposed by the Applicant and requested in their petitions to intervene that the waterway be constructed with sub-surface tunnels throughout its entire length.

The Tuscarora Indian Nation,[4] intervener, objects to having any of its lands taken for the reservoir or any other project purpose.

International Paper Company has requested that its claim to water rights involved in *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, 347 U. S. 239, be recognized and protected by including a condition in the license for proposed Project No. 2216.

On September 19, 1957, we issued an order issuing a license to Applicant for its proposed project, reserving for further consideration the matters involving the waterway, the area of the reservoir and the claimed water rights. The Applicant has not filed any acknowledgment of its acceptance of the tendered license, taking the position that it

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[3] By our orders issued October 25 and November 1, 1956 and September 12, 1957, respectively, intervention was granted to: Niagara Mohawk Power Corporation; Attorney General of the State of New York on behalf of the people of New York; National Rural Electric Cooperative Association and 28 rural electric cooperative associations distributing electric power in the States of New York, Ohio and Pennsylvania; Rochester Gas and Electric Corporation; County of Niagara, New York; City of Niagara Falls, New York; American Public Power Association; Municipal Electric Utilities Association of New York State; City of Jamestown, New York; Town of Lewiston, New York; and International Paper Company of New York, New York.

[4] By orders issued October 2, October 21 and December 9, 1957, intervention was granted to Industrial Power Consumers Conference, the Town of Niagara and the Tuscarora Indian Nation, respectively.

[fol. 5842] is not a "workable license." Under such circumstances we think it appropriate to supersede our order of September 19, 1957. However, the license tendered herewith will be made effective as of September 1, 1957 as originally provided.

The hearing previously scheduled was commenced on October 1, 1957; was recessed from time to time and was finally concluded on November 27, 1957. Sessions were held in Washington, D. C. and Buffalo, New York. Upon motion made by Applicant[3] we omitted the intermediate decision procedure by order issued December 6, 1957.

The Town of Lewiston, intervener, has requested that the area of the pumped-storage reservoir be reduced by approximately 720 acres of land because the town hopes to develop that tract of land for industrial uses. The tract consists principally of agricultural lands. As indicated above the proposed pumped-storage reservoir would have a usable storage capacity of 60,000 acre feet. There has been no suggestion that the usable storage capacity of the reservoir should be reduced. In any event approximately that amount of capacity is required to properly utilize the water resources involved here. In order to reduce the surface area of the reservoir and maintain that storage capacity it would be necessary to raise the dikes and operate the reservoir with a greater drawdown; modify the Tuscarora plant structures; and modify the pumping, generating, and electrical equipment with the result that the increase in cost would be equal to about $15,000 for each acre in the tract Lewiston would have us remove from the reservoir area. It is clear from the record that the value of these lands for industrial use is much less than $15,000 per acre. Therefore, we would not be justified in granting Lewiston's request.

The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to

[3] Applicant's motion was concurred in by Industrial Power Consumers Conference and by Staff Counsel, and it was opposed by certain of the other interveners.

remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive.

With respect to the type of waterway to be constructed, the Industrial Power Consumers Conference, intervener, [fol. 5843] urges that the waterway be constructed in accordance with Applicant's Plan VI because such a waterway would cost less than any proposed alternative waterway, with the result that power could probably be sold to industries in the area at lower cost.

Two of the interveners, the Town of Lewiston and the County of Niagara, filed briefs requesting that Applicant be required to modify its proposed waterway plan. They requested that the waterway consist of two tunnels 55 feet in diameter for a distance of approximately 6,500 feet from the intake to a point beyond Pine Avenue in the City of Niagara Falls, and that the remaining 15,000 feet of the waterway consist of two cut and cover conduits. This plan is identified in the record as "Plan B", and it would eliminate the 7,000-foot section of open canal.

The two municipal interveners in recommending modification of the Applicant's waterway Plan VI, contend that the adverse impact of the Applicant's proposed waterway on the area generally, and in particular the impact of the open canal on the area for many years after completion of construction, justifies the additional cost that would be incurred by the modification requested.

The staff of the Commission has suggested that substantially all of the adverse effects the municipal interveners wish to avoid by modification of Applicant's Plan VI can be accomplished by constructing two cut and cover conduits for the entire distance from the intake to the Tuscarora plant substantially as proposed by Applicant in

its original application. This plan is designated herein as "Plan A", and can be constructed at less than Plan B requested by the municipal interveners.

There is no real controversy over the estimated cost of the several alternative plans for the waterway. The total cost (capital cost plus capitalized value of power losses*) of the Applicant's proposed Plan VI is estimated to be $145,700,000; Plan A, suggested by the staff, is estimated to cost $171,400,000; and Plan B, requested by the two municipal interveners, is estimated to cost $193,500,000. From these estimates it is apparent that the project cost under Plan B should be approximately $47,800,000 more than the cost under Plan VI and that the cost under Plan A should be approximately $25,700,000 more than the cost under Plan VI. The question is whether the disruption to the community and the adverse impact on the area generally would be decreased under either Plan A or Plan B sufficiently to justify the added costs that would result from construction of either Plan A or Plan B in lieu of Plan VI.

[fol. 5844] The single difference between Plan A and Plan B is that under the latter plan a 6,500-foot section of the waterway commencing at the intake on the river would consist of two tunnels in lieu of the two cut and cover conduits. A 500-foot section at each end of each tunnel would have to be constructed from the ground surface to a depth of about 300 feet on an angle of 30 degrees to provide a means of getting men, equipment and materials in and out of the tunnels during construction. The area surrounding these entrances would have to be cleared to provide working space and would adversely affect those areas of the right of way to about the same extent as excavation for cut and cover conduits. Although it might be possible to permit existing homes to remain on a substantial part of the 6,500 foot section of the right of way if tunnels are constructed, there is testimony in the record which indicates that a substantial number of the home owners would not remain in

* Power losses under the several waterway plans vary depending upon magnitude of the loss in effective head resulting from varying degrees of water friction in the several types of conduits that could be constructed to convey the water.

their homes during construction of the tunnels. The Applicant is developing an area within which to move the homes of those who desire to be moved and the others will, of course, be compensated for the taking of their homes.

The disruption to traffic during construction could be as great if tunnels are constructed as it would be under the cut and cover plan. The material to be removed from the tunnels and the construction materials, including concrete for the lining in the tunnels, would have to be moved over city streets whereas the materials excavated and the construction materials under the cut and cover plan would be moved almost entirely over roads to be constructed on the right of way that would be cleared. These construction roads would be built so that they would pass under existing streets which cross the conduit right of way. In view of these facts we would not be justified in requiring the Applicant to incur the additional cost required to provide tunnels in lieu of cut and cover conduits in this 6,500 foot section of the waterway.

As pointed out earlier the only difference between Plan VI and Plan A is that under the latter plan two cut and cover conduits would be constructed for a distance of 7,000 feet within the Towns of Niagara and Lewiston in lieu of an open canal through that same section.

The open canal under Plan VI would be at least 200 feet wide at ground level and about 134 feet deep with the water surface as much as 70 feet below ground level. The water in the canal would be about 64 feet deep and would flow with a maximum velocity of 6.5 feet per second. Only one bridge would cross the 7,000 foot section and in order to protect the public from the hazards of the canal it would be necessary to parallel it on both sides with a very heavy fence in an effort to exclude the public from the area to avoid loss of life in the canal.

[fol. 5845] Although during the construction period the open canal would not affect the public and the surrounding area any more adversely than would covered conduits, the open canal would have adverse effects on the surrounding area for all time after the project is completed.

The construction, operation and maintenance of the Applicant's project with its very large and relatively low cost power output will undoubtedly stimulate growth in population and economic activity in the area adjacent to the project, including the City of Niagara Falls and the Towns of Niagara and Lewiston. This growth would require an extension of community facilities and services such as schools, roads, water supply sewers, police protection, fire protection and civil defense. The construction of cut and cover conduits in lieu of the open canal would permit use of the right of way for many purposes such as parks, golf courses or other recreational areas, streets, underground utilities, transmission line rights-of-way and other uses, which could not be made if the open canal is constructed.

The open canal would serve to partition the Towns of Niagara and Lewiston and would complete the encirclement of a substantial area in the two towns. The Niagara River on the west and the existing system of railroad tracks and yards to the south provide obstacles on two sides. The open canal between the Tuscarora and Lewiston power plants will provide a serious obstacle on the north and the open canal section on the west, if constructed, would complete the encirclement.

In this connection the open canal section between the intake and the Tuscarora forebay with its "man proof" fences and with only a single bridge over its 7,000 foot length would be particularly undesirable in that it would provide a formidable barrier and be very detrimental in any effort to evacuate the people from the area in an emergency. This would seriously restrict the establishment of an adequate civil defense program and could result in substantial loss of life in the event of an enemy attack.

Another factor we have considered in reaching our decision to require cut and cover conduits in lieu of the open canal is the possible effect the increase in project costs might have on the cost of power to be sold to industries in the area, both existing and potential, which are looking to the Niagara project as a source of power at a cost low

enough to enable them to compete with similar industries in other parts of the country. An analysis of the probable cost of power made by the staff based upon a 50-year amortization period indicates that the net average annual energy cost per kilowatt-hour of project output would be 2.71 mills if the project waterway is constructed in accordance with [fol. 5846] Plan VI as compared to a cost of 2.80 mills under Plan A.* The Applicant contends that these figures are inaccurate because the project investment must be recovered through power revenues in about 30 years instead of 50 years. An analysis of the cost made by the Applicant, based on the staff's method of computation to which Applicant applied a debt service factor of 1.4 to reflect the shorter period, indicates that the net average annual energy cost per kilowatt-hour would be 3.61 mills under Plan VI and 3.73 mills under Plan A. It is probable that neither analysis indicates with any great degree of accuracy what the actual net average annual energy cost per kilowatt-hour will be upon completion of the project. However, the net average costs developed in both analyses do indicate the range of the difference in cost per kilowatt-hour that would probably be experienced under the two alternative waterway plans. These differences, ranging from .09 mill to .12 mill per kilowatt-hour could not in our judgment be expected to have a sufficiently adverse effect upon the cost of project power to be delivered to local industries to justify our authorizing the lower cost open canal with its resulting disadvantages as compared with the cut and cover conduits authorized herein.

As mentioned previously, International Paper Company has requested the inclusion of a condition in the license for Project No. 2216 which would recognize and protect its claim to the use of 730 cubic feet per second (cfs) of water from the Niagara River for hydroelectric development. In our view we are not required to pass upon the claim of International Paper Company in this proceeding and, con-

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* The greater friction losses that would be experienced in a Plan A waterway would decrease the net average annual energy output of the project by about 100 million kilowatt-hours. (13.0 billion under Plan VI as compared to 12.9 billion under Plan A.)

sequently, we are not including in the license any of the alternative conditions requested by the Company. However, if it has a valid claim against the Power Authority of the State of New York, the Company will be protected by Section 10 (e) of the Act [16 U.S.C. 803 (e)] which reads in part as follows:

> • • • Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

[fol. 5847] By letter dated September 30, 1957 the Secretary of the Interior reported on the application for license and recommended that three conditions be included in the license. Article 31 of the license as issued herein is substantially the same as the first condition proposed by the Secretary. The other two proposed conditions appear to be designed to require that the project shall not be operated in such a manner as to endanger human life in the Niagara River at and downstream from the Lewiston power plant. We do not have sufficient information to determine at this time whether the license should be so conditioned. However, this matter will be considered further and we may at any time prescribe appropriate rules and regulations for the protection of life, health and property pursuant to the provisions of Section 10 (c) of the Act.

The Secretary of the Army and the Chief of Engineers in reporting on the application have recommended certain terms and conditions for inclusion in the license as hereinafter provided.

The Commission finds:

(1) The proposed project would affect navigable waters of the United States.

(2) The project authorized herein consists of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of

which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits filed by Applicant, the approval of which by the Commission shall be as hereinafter provided.

(b) All project works comprising:

(1) A concrete intake and gate structure in and near Niagara River about three miles above the Falls;

(2) A cut and-cover conduit system extending about 21,500 feet from the intake-gate structure to the forebay/afterbay of the Tuscarora pumping-generating plant:

[fol. 5848] (3) The Tuscarora pumping-generating plant in the Town of Lewiston with twelve pump-generator units rated about 20,000 kilowatts each as generators, and about 28,000 kilowatts as motors, located between the Tuscarora forebay/afterbay and the Tuscarora pumped-storage reservoir;

(4) The Tuscarora pumped-storage reservoir in the Town of Lewiston located adjacent to the pumping-generating plant having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet;

(5) An open canal extending about 2,600 feet from the Tuscarora forebay/afterbay to the forebay of the Lewiston generating plant;

(6) The Lewiston generating plant in the Town of Lewiston with forebay, penstocks, thirteen 150,000-kilowatt generating units, step-up transformers, and high-tension lines to the switchyard; and

(7) A switchyard near the pumping-generating plant;

the location, nature and character of which project works are more specifically shown and described by exhibits filed by Applicant and which are designated and described as follows:

Exhibit L: (FPC No. 2216-23) Waterways—Intake Structure;

(FPC No. 2216-24) Waterways—Intake Gate Structure;

(FPC No. 2216-25) Lewiston Power Plant Plan;

[fol. 5849] (FPC No. 2216-26) Lewiston Power Plant—Downstream Elevation;

(FPC No. 2216-27) Lewiston Power Plant—Generator and Transformer Structures;

(FPC No. 2216-28) Lewiston Power Plant—Intake Structure;

(FPC Nos. 2216-29 and -30) Tuscarora Pump-Power Plant;

(FPC No. 2216-31) Parkway Development; and

Exhibit M: Three printed sheets, entitled "General Descriptions of Equipment" filed in the Commission August 20, 1956, as modified by Exhibit M filed in the Commission on September 30, 1957.

(c) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(3) The Applicant is a corporate municipal instrumentality, a political subdivision of the State of New York, organized and existing under the laws of the State of New York, and is a municipality within the meaning of Section 3 (7) of the Act; and it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(4) Public notice of the application has been given and a public hearing has been held;

[fol. 5850] (5) The proposed project will not affect any Government dam, and the issuance of a license therefor, as hereinafter provided, will not affect the development of any water resources for public purposes which should be undertaken by the United States.

(6) Applicant has submitted satisfactory evidence of its financial ability to construct the proposed project.

(7) Subject to the terms and conditions hereinafter specified, the proposed project is best adapted to a comprehensive plan for development of the Niagara River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(8) The installed horsepower capacity of the proposed project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charges is 2,920,000 horsepower. The energy to be generated at the proposed project will be marketed in accordance with the provisions of Public Law 85-159, *supra*.

(9) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the cost of administration of Part I of the Act as hereinafter provided is reasonable.

(10) It is desirable to reserve for future Commission determination what transmission lines, if any, should be included in this license.

(11) Exhibit J, K and L drawings should be modified to conform with the description of the project works in finding (2) (b) above, and, as so modified, they should be filed for approval.

The Commission orders:

(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4 (e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), for a period of 50 years, effective as of September 1, 1957, for the construction, operation and maintenance of the Niagara Project No. 2216, located on the Niagara River, a navigable water of the United States and an international boundary stream, in the vicinity of Niagara Falls, for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada, subject to the terms and conditions of the Federal Power Act, and the aforementioned [fol. 5851] Public Law 85-159, both of which are incorporated by reference as part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, and subject to the applicable provisions of the aforementioned 1950 treaty between the United States and Canada.

(B) This license is also subject to the terms and conditions set forth in Form L-4, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters of the United States" (16 FPC 1284), which terms and conditions, described as Articles 1 through 18 therein, except for Articles 7, 14 and 15 thereof, and except that the Chief of Engineers, Department of the Army, shall have supervision of stream gaging operations under Article 6 thereof in lieu of the District Engineer of the United States Geological Survey, are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 19. The Licensee shall pay to the United States the following annual charge:

For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed capacity (2,920,000 horsepower) plus two and one-half ($2\frac{1}{2}$) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made.

Article 20. In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

Article 21. The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article 20 available for use within reasonable economic transmission distance in neighboring States, but this article shall not be construed to require more than [fol. 5852] 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The Licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the Licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article 20.

Article 22. The Licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the Licensee of Federal Power Commission Project No. 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by Project No. 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by Project No. 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from Project No. 16 was utilized: *Provided*, That the Licensee of Project No. 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both Licensees and approved by the Federal Power Commission which

shall include the following (a) the Licensee of Project No. 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the Licensee of Project No. 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

Article 23. The Licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in Article 20, and to the neighboring States in accordance with Article 21.

[fol. 5853] *Article 24.* In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the Licensee, consistent with Articles 20 and 22.

Article 25. The Licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the Licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the Licensee's net investment shall not exceed $15,000,000.

Article 26. The Licensee shall pay to the United States and include in its net investment in the project herein

authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with Article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed. The Licensee shall also pay to the United States the United States share of the cost of operation, maintenance and replacements of the remedial works. The amounts to be paid under this article shall be hereafter determined by the Commission.

Article 27. The Licensee shall submit for Commission approval Exhibits F and K, prepared in accordance with the Commission's rules and regulations, within two years from the effective date of this license.

Article 28. The Commission reserves the right to determine at a later date what transmission lines shall be included in this license as part of the project works.

Article 29. The Licensee shall commence construction of the project within one year from the effective date of this license, shall thereafter in good faith and with due diligence prosecute the construction, and complete the project within six (6) years from the effective date of this license.

Article 30. The Licensee, prior to starting construction of any portion of the project which would affect the operation of the existing terminal at the foot of Hyde Park Boulevard, shall: construct in the general vicinity of the [fol. 5854] intake structure, a terminal for the receipt of water borne commerce; excavate a channel alongside the terminal and connecting to the Federal channels in Niagara River to a depth to fully utilize the depths provided in the Federal channels; construct a suitable mainland access to the terminal; submit for Commission approval Exhibit L, general design drawings for these works in accordance with the Commission's rules and regulations; and transfer the completed terminal facilities to the City of Niagara Falls without charge.

Article 31. The Licensee shall construct, operate and maintain or shall arrange for the construction, operation

and maintenance of such fish facilities or protective devices for the purpose of conserving fish and wildlife resources, and comply with such reasonable modifications in project structures and operations in the interest of conserving fish and wildlife resources as may be prescribed hereafter by the Commission upon recommendation of the Secretary of the Interior or the New York State Division of Fish and Game.

Article 32. The Licensee shall at such times as the Commission may direct and to the extent that it is economically feasible to do so, and after notice and opportunity for hearing, install additional units in the Lewiston and/or Tuscarora plants and make other project changes as may be found by the Commission to be best adapted to a comprehensive plan for improving and developing the Niagara River.

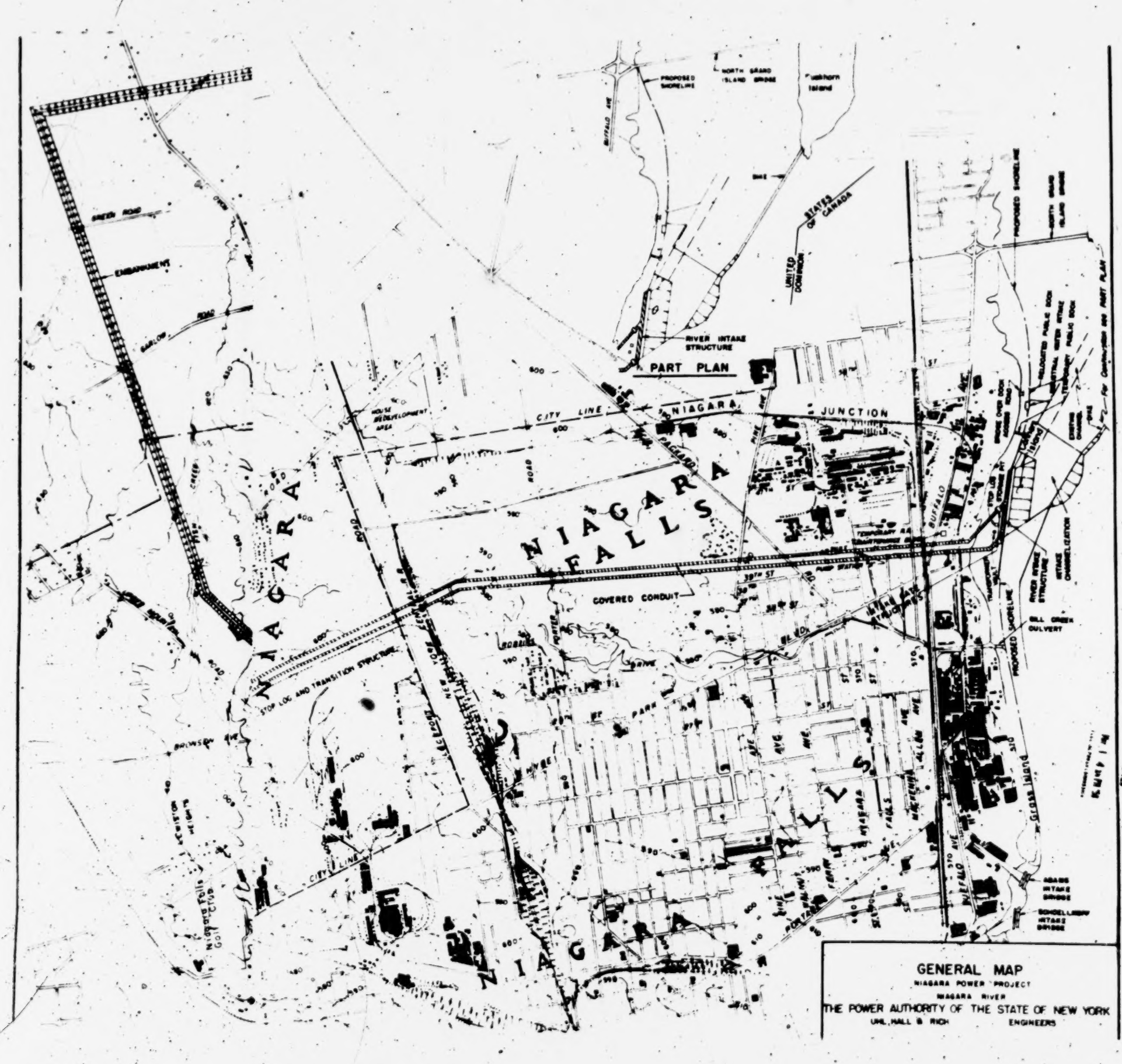
Article 33. The Licensee shall, not later than July 1, 1958, file for Commission approval revised Exhibits J and L drawings for the pumped-storage reservoir, for the cut and cover conduit system extending from the Conners Island intake structure to the Tuscarora forebay/afterbay, and for the open canal extending from the Tuscarora forebay/afterbay to the Lewiston forebay.

Article 34. The final design of the intake structure shall be based on model tests and the Licensee shall, not later than July 1, 1958, file for Commission approval Exhibit L drawings showing such final design.

Article 35. The Licensee shall reimburse the United States for the cost of any model tests considered necessary by the Chief of Engineers to determine the effect of the intake structure together with the approach channel on navigation in the Niagara River.

Article 36. The final design of the cut and cover conduit shall be checked by a structural model with respect to its strength and water tightness.

[fol. 5855] *Article 37.* The Licensee shall make hydraulic model studies of the entire waterway extending from the Conners Island intake to the Lewiston power plant for the


PART PLAN
RIVER INTAKE STRUCTURE
PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
Hamilton Island
STATES OF CANADA
UNITED DOMINION
CITY LINE
NIAGARA JUNCTION
NIAGARA FALLS
COVERED CONDUIT
STOP LOG AND TRANSITION STRUCTURE
RIVER INTAKE STRUCTURE
INTAKE CHANNEL-EXCAVATION
BILL CREEK CULVERT
PROPOSED SHORELINE
ADAMS INTAKE BRIDGE
SCHOELLKOPF INTAKE BRIDGE
Niagara Falls Golf Club
GENERAL MAP
NIAGARA POWER PROJECT
NIAGARA RIVER
THE POWER AUTHORITY OF THE STATE OF NEW YORK
UHL, HALL & RICH ENGINEERS

purpose of testing its performance under normal load conditions and under sudden load rejection conditions.

Article 38. The Licensee shall engage at least two qualified independent consulting engineers for the purpose of reviewing and reporting on the hydraulic and structural design of the waterways. The report of the consulting engineers shall be submitted for Commission consideration not later than the date upon which design drawings (Exhibit L) for the waterways are filed pursuant to Articles 33, 36 and 37.

Article 39. The Licensee shall protect property and the public during construction and shall minimize disruption of community activities and facilities in accordance with representations made by the Licensee on the record in the proceeding on the application for license.

Article 40. The Licensee shall, to the satisfaction of the Commission, restore the surface area affected by the project to permit reasonable utilization of the area by others consistent with the primary purpose of the project.

(C) The exhibits designated and described in finding (2)(b)(7) are approved and made part of the license.

(D) The order issued September 19, 1957 issuing license for Project No. 2216 is rescinded and superseded by this order.

(E) The request of intervener, International Paper Company that conditions proposed by it for inclusion in the license recognizing and protecting its water right claim in Project No. 2216, be and the same is hereby denied.

(F) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within sixty (60) days from the date of its issuance.

By the Commission.

Joseph H. Gutride, Secretary.

[Seal]

[fol. 5856] In Testimony of Acceptance of all the provisions and conditions of the license for Project No. 2216, Power Authority of the State of New York, this 4th day of February, 1958, has caused its corporate name to be signed by William Wilson its Vice-Chairman, and its corporate seal to be affixed hereto and attested by W. S. Chapin its Secretary, pursuant to a resolution of its Board of Trustees duly adopted on the 31st day of January 1958, a certified copy of the record of which is attached hereto.

Power Authority of the State of New York, By William Wilson, Vice-Chairman.

Attest: W. S. Chapin, Secretary.

(Executed in quadruplicate)

[fol. 5857]

CERTIFIED COPY OF RESOLUTION

This Is to Certify that at a special meeting of Power Authority of the State of New York, held on January 31, 1958, a resolution, of which the following is a true and complete copy, was adopted:

> Resolved, that the Authority hereby accepts the license for development of the Niagara River, Project 2216, issued by the Federal Power Commission on January 30, 1958, and all of the provisions and conditions thereof; and be it further
>
> Resolved, that the Chairman or Vice-Chairman and the Secretary are hereby authorized and directed to execute the acceptance of such license attached thereto and to file four copies of such acceptance and of this resolution with the Federal Power Commission.

This Is to Certify Further that the above resolution has not been modified, amended or rescinded and is in full force and effect.

William S. Chapin, Secretary.

[Seal]

[fol. 5879]

BEFORE FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

ORDER DENYING APPLICATION FOR REHEARING AND DISMISSING MOTION FOR STAY—(Issued March 21, 1958)

On February 28, 1958, the Tuscarora Indian Nation (Intervener) filed application for rehearing of the Commission's order issued January 30, 1958, issuing license to the Power Authority of the State of New York (Licensee) to construct, operate and maintain a proposed hydroelectric redevelopment project to be located along the Niagara River in the State of New York. In its application for rehearing, intervener has requested modification of said order to exclude approximately 1,000 acres of land of the Tuscarora Indian Nation which the licensee proposes to acquire for reservoir purposes.

By Public Law 85-159 (71 Stat. 401) we were directed to issue a license to the Power Authority of the State of New York for the Niagara redevelopment. The pumped-storage reservoir, which is part of the Niagara redevelopment, would have a storage capacity of 60,000 acre feet and would occupy about 2,800 acres of land. The best location of the reservoir would require approximately 1,000 acres of land owned by Intervener.

In its application for rehearing Intervener contends that the Licensee lacks power to acquire Intervener's lands and that the Commission does not have power to authorize the Licensee to use them. However, Intervener also points out that the law on this question is unsettled in the light of Section 21 of the Federal Power Act.

It is not unusual for a land owner to refuse to part with land which is necessary for some public purpose, a matter which Congress was aware of when it enacted Section 21 of the Act. The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question.

[fol. 5880] Lastly, Intervener contends that the Commission did not make a finding required by Section 4 (e) of the Act relating to "reservations" as defined in the Act. The status of Intervener's lands were discussed in a letter from an Assistant Secretary of the Interior to Intervener under date of November 1, 1957. The letter states that: "As your reservation lands are under State jurisdiction, this Department is not in a position to present your case for you." Since Intervener's lands are not within an Indian reservation under supervision of the Secretary of the Interior they are not part of a "reservation" referred to in Section 4 (e) as defined in Section 3 (2) of the Act and the finding suggested by Intervener is not required.

On March 18, 1958, Intervener filed a motion requesting us to stay our license order of January 30, 1958 "pending a decision on the Petition for Rehearing." The motion was not filed in time to permit us to consider it prior to our consideration of the application for rehearing. In view of our denial herein of that application the motion for stay has become moot. Consequently, it should be dismissed.

The Commission finds:

The assignments of error and grounds for rehearing in the above-described application for rehearing set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its above-described order issued January 30, 1958, or which having now been considered warrant any change or modification of said order.

The Commission orders:

(A) The application for rehearing and modification of the Commission's order issued January 30, 1958, is hereby denied.

(B) The motion for stay of the Commission's order issued January 30, 1958, is hereby dismissed.

By the Commission.

Joseph H. Gutride, Secretary.

[fol. 8413]

LICENSEE EXHIBIT J

(See Opposite) ☞

POWER AUTHORITY OF THE STATE OF NEW YORK

THE COLISEUM TOWER – 10 COLUMBUS CIRCLE

NEW YORK 19, N. Y.

TELEPHONE COLUMBUS 5-6510

TRUSTEES

ROBERT MOSES
CHAIRMAN
WILLIAM WILSON
VICE CHAIRMAN
CHARLES POLETTI
A. THORNE HILLS
FINLA G. CRAWFORD

WILLIAM B. CHAPIN
GENERAL MANAGER
J. BURCH McMORRAN
CHIEF ENGINEER
THOMAS F. MOORE, JR.
GENERAL COUNSEL
HENRY B. TALIAFERRO
DIRECTOR OF
POWER UTILIZATION

May 1, 1958

RECEIVED
MAY 1 4 10 PM '58
FEDERAL POWER COMMISSION

Federal Power Commission
Washington 25, D. C.

Gentlemen:

2 FORMAT

Pursuant to the requirements of the Federal Power Commission license for Project No. 2216 (Niagara Project) issued to the Power Authority of the State of New York on January 30, 1958, we are transmitting herewith the original tracing and five (5) blueprints of the following revised exhibits:

Exhibit J - General Map - Niagara Power Project
Exhibit K - Project Area Map
Exhibit L - Sheet 8 - Tuscarora Pump/Power Plant

It is requested that the Commission grant approval of these exhibits at the earliest practicable date.

Yours very truly,

J. B. McMorran
Chief Engineer

encls.

OFFICIAL FILE COPY

TO	INIT.	DATE
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		6-3

DOCKETED
MAY 1 1958

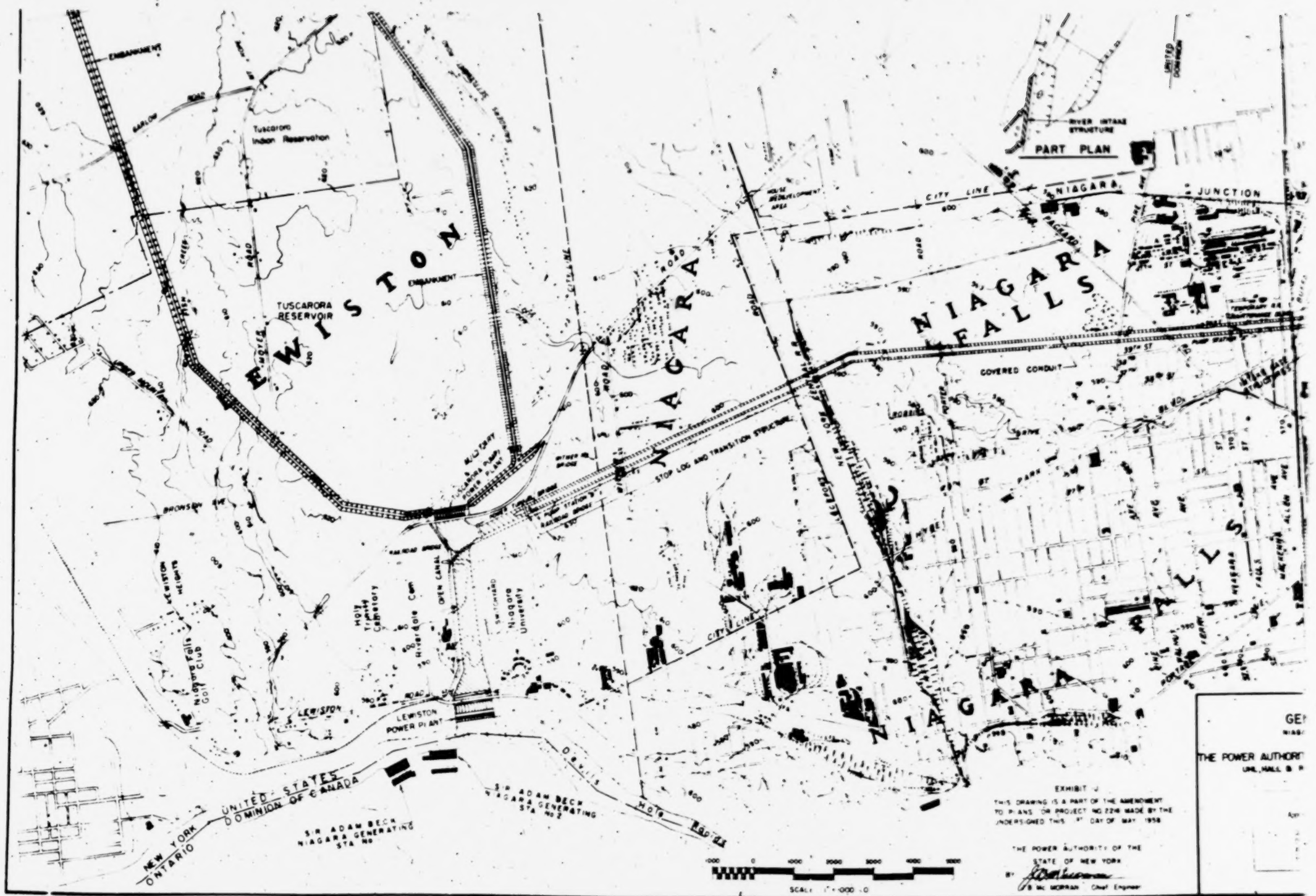
[fol. 8413]

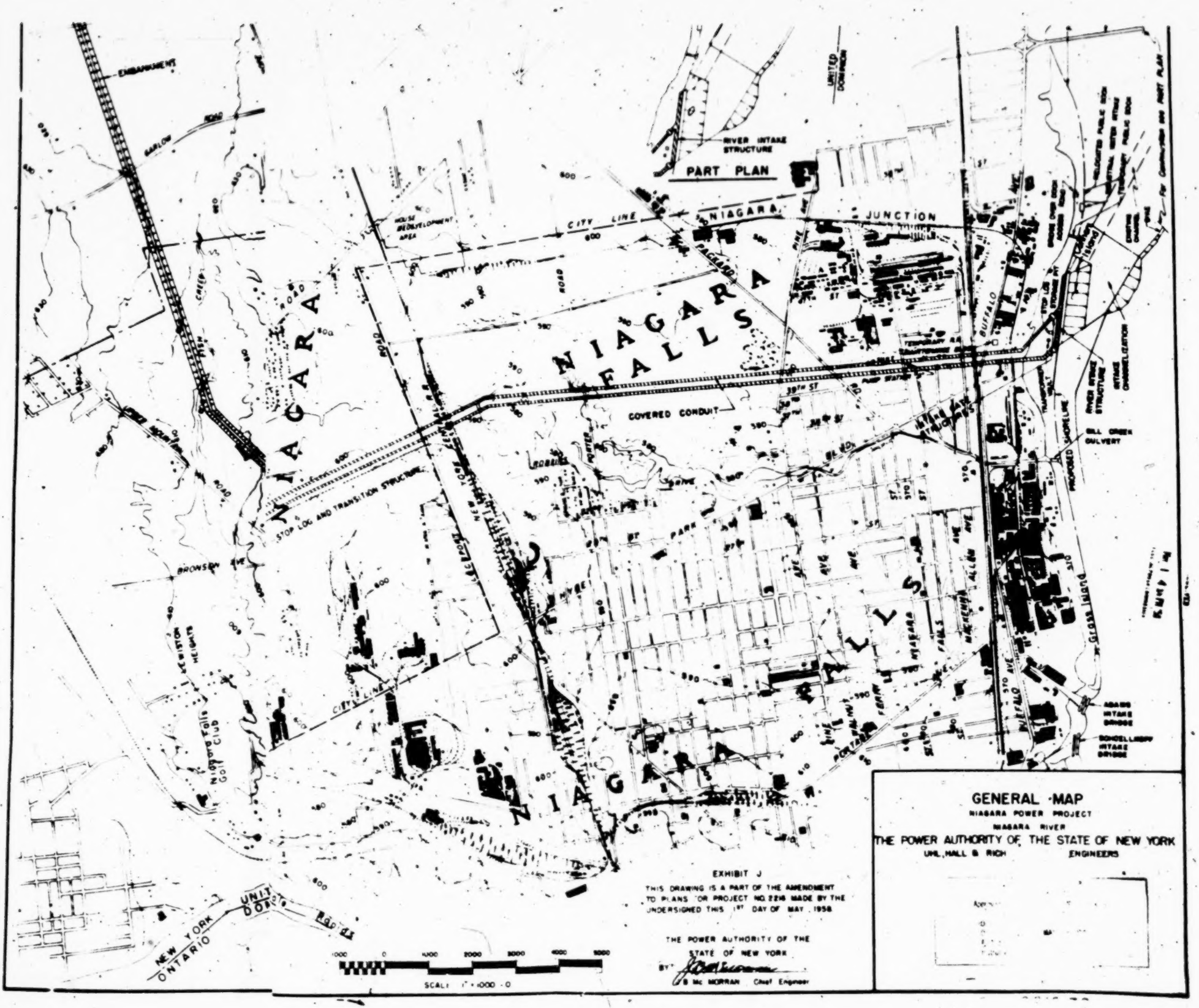
LICENSEE EXHIBIT J

[fol. 8414]

(See Opposite) ☞


PART PLAN
RIVER INTAKE STRUCTURE
PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
Bedford Cemetery
BUFFALO AVE
STATES OF CANADA
UNITED
CITY LINE
NIAGARA
JUNCTION
NIAGARA FALLS
COVERED CONDUIT
Tuscarora Indian Reservation
TUSCARORA RESERVOIR
EMBANKMENT
GRAND ISLAND
NIAGARA RIVER
TUSCARORA POWER PLANT
STOP LOG AND TRANSITION STRUCTURE
RAILROAD BRIDGE
OPEN CANAL
Holy Trinity Cemetery
Riverdale Cem
Niagara University
Niagara Falls Golf Club
LEWISTON
LEWISTON POWER PLANT
ROAD
THE POWER A


PART PLAN
TUSCARORA RESERVOIR
Tuscarora Indian Reservation
LEWISTON
NIAGARA FALLS
NIAGARA FALLS
NIAGARA FALLS
CITY LINE
CITY LINE
JUNCTION
COVERED CONDUIT
STOP LOG AND TRANSITION STRUCTURE
RIVER INTAKE STRUCTURE
OPEN CANAL
LEWISTON POWER PLANT
SIR ADAM BECK NIAGARA GENERATING STA NO
SIR ADAM BECK NIAGARA GENERATING STA NO 2
NEW YORK
ONTARIO
UNITED STATES
DOMINION OF CANADA
Niagara Falls Golf Club
Holy Trinity Cemetery
Niagara University
EXHIBIT J
THIS DRAWING IS A PART OF THE AMENDMENT TO PLANS OR PROJECT NO 2216 MADE BY THE UNDERSIGNED THIS 1st DAY OF MAY 1958
THE POWER AUTHORITY OF THE STATE OF NEW YORK
BY J.B. McMORRAN Chief Engineer
SCALE 1" = 1000 .0
THE POWER AUTHORITY


PART PLAN
NIAGARA FALLS
NIAGARA FALLS
NIAGARA JUNCTION
CITY LINE
COVERED CONDUIT
STOP LOG AND TRANSITION STRUCTURE
RIVER INTAKE STRUCTURE
INTAKE CHANNEL EXCAVATION
GILL CREEK CULVERT
PROPOSED SHORELINE
ADAMS INTAKE BRIDGE
SCHOELLKOPF INTAKE BRIDGE
NIAGARA FALLS GOLF CLUB
NEW YORK ONTARIO
SCALE 1" = 1000' - 0
EXHIBIT J
THIS DRAWING IS A PART OF THE AMENDMENT TO PLANS FOR PROJECT NO. 2246 MADE BY THE UNDERSIGNED THIS 1ST DAY OF MAY, 1958
THE POWER AUTHORITY OF THE STATE OF NEW YORK
BY
G. Mc MORRAN Chief Engineer
GENERAL MAP
NIAGARA POWER PROJECT
NIAGARA RIVER
THE POWER AUTHORITY OF THE STATE OF NEW YORK
UMIL, HALL & RICH ENGINEERS

[fol. 8417]

BEFORE FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

ORDER APPROVING PROJECT EXHIBIT J—(Issued May 5, 1958)

On May 1, 1958, in compliance with Article 33 of its license for major Project No. 2216, Power Authority of the State of New York filed for Commission approval and inclusion in the license the following described project exhibit:

Exhibit J (FPC No. 2216-32) entitled "General Map—Niagara Power Project".

The Exhibit J drawing is a general map of the entire project area, showing the location of the project works authorized by the license for Project No. 2216.

The Commission finds:

The above-described Exhibit J drawing conforms to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) The above-described Exhibit J drawing is approved as part of the license for Project No. 2216.

(B) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order.

By the Commission.

Joseph H. Gutride, Secretary.

[fol. 8417a]

Joint Appendix—Filed October 20, 1958

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

PETITION FOR REVIEW—May 16, 1958

To the United States Court of Appeals for the District of Columbia Circuit and the Honorable Judges thereof.:

Petitioner, the Tuscarora Indian Nation, is a recognized tribe of American Indians residing in the State of New York. It is aggrieved by an order issued by the respondent Federal Power Commission under Section 4(e) of the Federal Power Act and Public Law 85-159, 85th Cong., 71 Stat. 401. Having been a party to the proceedings before the Commission, petitioner hereby files in this Court pursuant to Section 313(b) of said Act, 16 U.S.C. 8251(b), this petition to review said order, praying that said order be set aside and the matter remanded to the Commission with appropriate instructions. The Commission's order was issued on January 30, 1958, in the proceeding entitled "In the Matter of Power Authority of the State of New York", [fol. 8417b] bearing the Commission's docket number of "Project No. 2216", and the said order was entitled *Order Issuing License (Major) and Superseding Prior Order.* On March 21, 1958, a petition for rehearing filed by the petitioner was denied by order of the Commission. This petition for review is filed within 60 days after the denial of the rehearing.

In support of its petition, the petitioner respectfully represents and shows:

A. Nature of the proceedings as to which review is sought

The order of the Commission of which review is sought granted a license to the Power Authority of the State of New York under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401). This license, effective for 50 years from and after September 1, 1957, authorized the Power Authority to construct, operate and maintain Project No. 2216, located on the Niagara River within the State of New York. The said project consists of hydroelectric facilities designed to utilize all the waters of the Niagara River which it is permissible to divert under the terms of a 1950 treaty between the United States and Canada (1 U.S.T. 694). Among the various items of the facilities to be constructed is a pumped storage reservoir covering some 2,800 acres of land.

The petitioner, Tuscarora Indian Nation, intervened in the proceedings before the Commission, objecting to the fact that the proposed reservoir would cover approximately 1,000 acres of its land and contesting the authority of the Power Authority to acquire Indian land for such use.

In its order issued on January 30, 1958, the Commission noted the petitioner's objection and merely stated that "we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant (the Power Authority) is unable to acquire the Indian lands, although alternative lands may be more expensive."

The petitioner thereupon filed a petition for rehearing. On March 21, 1958, the Commission issued an order denying the rehearing petition.

[fol. 8417c] B. The facts and the statutes upon which venue is based

The petitioner was allowed to intervene as a party to the proceeding before the Commission by virtue of a Commission order dated December 9, 1957.

The statute upon which venue is based is Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b). That section

permits "Any party to a proceeding . . . aggrieved by an order issued by the Commission" to obtain a review of such order in the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in said court within 60 days after denial of rehearing of the Commission's order.

C. The grounds upon which relief is sought

The petitioner intends to rely upon each of the separately numbered points set forth below.

1. The Commission as a matter of law does not have the power to authorize the use of tribal lands of the petitioner for the reservoir purposes of the Niagara Project in question.

2. The Power Authority of the State of New York lacks power to acquire lands belonging to the petitioner without specific permission from Congress, which permission has not been requested or granted and which cannot be secured through an order of the Commission.

3. The Commission's order of January 30, 1958, was defective in its failure to make findings, based upon facts in the record, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), that the grant of a license involving tribal lands embraced within Indian reservations "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."

D. The relief prayed

The petitioner respectfully prays:

1. That a copy of this petition be served upon the respondent Federal Power Commission.

[fol. 8417d] 2. That the Commission be required to certify and transmit to this Court so much of the transcript of record in the proceeding bearing the docket number "Project No. 2216" as related to the intervention and participation of the petitioner in said proceeding and to the lands, interest and claims of the petitioner.

3. That this Court review the Commission's order dated January 30, 1958, and its order denying rehearing in said proceedings before the Commission; and that after such review this Court set aside said order of January 30, 1958, and remand the matter to the Commission with instructions to amend the order so as to exclude from the license land belonging to the petitioner.

4. That this Court grant the petitioner such other and further relief as may be just and equitable.

Respectfully submitted,

Arthur Lazarus, Jr., 1700 K Street, N. W., Washington 6, D. C., Counsel for Petitioner.

Of Counsel: Eugene Gressman, 1700 K Street, N. W., Washington 6, D. C., Strasser, Spiegelberg, Fried & Frank, 1700 K Street, N. W., Washington 6, D. C.

Dated: May 16, 1958

[fol. 8417e] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor.

On Petition for Review of an Order of the Federal Power Commission

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Mr. Arthur Lazarus, Jr., with whom *Mr. Eugene Gressman* was on the brief, for petitioner.

Mr. John C. Mason, Deputy General Counsel, Federal Power Commission, with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Mr. Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, also entered an appearance for respondent.

Mr. Thomas F. Moore, Jr., with whom *Mr. Frederic P. Lee* was on the brief, for intervenor.

[fol. 8417f]

OPINION—Decided November 14, 1958

Before PRETTYMAN, Chief Judge, and EDGERTON and DANAHER, Circuit Judges.

PRETTYMAN, *Chief Judge:* The issue here is whether the New York Power Authority has a valid license from the Federal Power Commission to build a dam that will flood certain lands of the Tuscarora Indians. We are of opinion that the case must be remanded to the Federal Power Commission for further consideration. In order that the litigation may not be delayed more than is necessary, we shall state in this memorandum the propositions which lead to our conclusion, without taking the time to complete an opinion in the customary form.

I

The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides: "No purchase, grant, lease, or other conveyance of lands * * * from *any* Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Emphasis added.) The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York

[1] Rev. Stat. § 2116 (1875), 25 U.S.C.A. § 177.

[2] 64 Stat. 845, 25 U.S.C.A. § 233.

jurisdiction of certain actions involving Indians but contained the proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York". The United States Court of Appeals for the Second Circuit [fol. 8417g] held that the lands involved here are protected by that provision.[3] It makes no difference how title to the land may have been acquired by the tribe.[4]

The statement in the letter of the Assistant Secretary of the Interior, referred to in the Commission's order denying rehearing, that these reservation lands are under state jurisdiction, is patently in error in so far as alienation is concerned.

To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner.

II

We have jurisdiction. The Federal Power Commission issued the license for this project (Project No. 2216, Niagara Project) by an order dated January 30, 1958. It did not in that order designate the land upon which the reservoir here involved should be located.[5] In an order

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[3] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F.2d 885 (1958).

[4] *See United States* v. *7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); Cohen, Federal Indian Law 321 (4th ed. 1945); 18 Ops. Att'y Gen. 235 (1885). And also see *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[5] The Commission knew in January of the opposition of the Tuscaroras. The January 30th order recited: "The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

[fol. 8417h] dated May 5, 1958, the Commission approved for inclusion in the license a map showing the location of the project works authorized by the license. The Tuscarora Nation petitioned for review of the January order. It did not separately or specifically petition for review of the May order. The Power Authority argues that the only order as to which the Tuscaroras are aggrieved is the May order and that we have no jurisdiction over that order because no appeal was taken from it. We treat the May order as the Commission treated it, *i.e.*, that the map which it approved became a part of the license for the project, which license was issued by the January order. As a matter of fact, some time prior to April 18, 1958, the State of New York, on behalf of the Power Authority, for purposes of condemnation filed with the County Court of Niagara County a map and a description of the project as to which it claimed to be a licensee of the Federal Power Commission, and that map included these Tuscarora lands. The January order of the Commission and all its parts are before us on this petition for review.

III

The Commission was expressly directed by the Congress to issue a license to the Power Authority of New York for the construction of a power project with capacity to utilize all of the United States share of the water of the Niagara River.[3] That statute provided, *inter alia*: "The Federal Power Commission shall include among the licensing conditions, *in addition to those deemed necessary and required under the terms of the Federal Power Act*, the following: [describing seven conditions.]" (Emphasis supplied.) Thus the special statute required the Commission to include in the license all those conditions [fol. 8417i] required by the Federal Power Act. The statute (Sec. 2) also required that the rules of practice and procedure of the Commission should apply to the granting of the license.

Moreover the record is quite clear that Congress was not advised of the possibility that Indian reservation lands

[3] Act of Aug. 21, 1957, 71 Stat. 401.

might be sought as the site of part of the project.[1] The Committee reports make no mention of the location of the project works, except, of course, that they would be in this area. During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company. Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate, "No dams or provisions for storage of water are necessary."[2] This testimony related to the project as planned prior to the Schoellkopf disaster, but we are not advised that the impression given was ever withdrawn or changed.

Congress did not by the special statute of 1957 license the Power Authority for this project. It directed the Commission to issue the license. It did not specify the works (dams, reservoirs, etc.) of which the project was to consist or the property upon which the project works were to be located. It left all those matters to the Commission. It did not specify all the licensing conditions; it specified some and left the others to the Commission. It contemplated, and explicitly said, that there would be a proceeding before the Commission in the process of granting the license. We think Congress clearly meant that the license should be issued under the Federal Power Act and according to the terms of that Act; save only that Congress itself named [fol. 8417] the licensee, described the scope of the license, and specified seven conditions to be included in the license by the issuing Commission.

As a matter of fact the Federal Power Commission did not understand when it issued its license order of January 30, 1958, that the taking of these reservation lands was necessary for the project or that it was authorizing the taking of such lands. In its order the Commission referred to the objection of the Tuscaroras to the use of their land for reservoir purposes and said: "However,

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[1] 103 Cong. Rec. 13194-211, 13364-5, 14437-56 (1957); H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957); S. Rep. No. 539, 85th Cong., 1st Sess. (1957).

[2] 103 Cong. Rec. 14438 (1957).

we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

We conclude on this point that Congress did not in the special statute consent to or authorize the taking of this Indian land for this project.

We have given careful consideration to the possibility that Congress, in adopting the 1957 legislation, was exercising for the United States the totality of its sovereign capacity in respect to this resource, and that the exercise of this power by Congress might be said to be without limitations. This might be in furtherance of a policy of Congress so to govern disposal of rights to develop hydroelectric power that the development would be in the manner the Congress, not an administrative agency or the courts, might select. Accordingly it might be argued that Congress in the 1957 Act made provision, by a single stroke, for the immediate development by the Power Authority of one of the nation's greatest resources, with all the concomitant factors of necessary works, seizure of property, and conditions of operation. Of course, had the Federal Government chosen to develop the power through its [fol. 8417k] own plant, it could have done so without the slightest reference to the Power Authority. And, it may be argued, it did precisely that and the Authority is an agent of the United States, as well as of the State of New York. Under that view there need be no reference to Part I of the Federal Power Act and hence none to Section 4(e), much less to Section 3(2). Part I of that Act, in short, might be said to have applicability only in the event that an application by an entity essentially private in origin was made for a license in accordance with the terms of the Act. If Congress, on the other hand, wished to speak directly in the premises—and in behalf of the United States,—it was free to do so in complete disregard of limitations to be found in the Act which would apply in the case of others. Such a course, had Congress adopted it, would have the

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[1] See *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940); compare, *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250 (1954).

advantage of short-circuiting restrictions and conditions to be found in the Power Act, to the end that the Power Authority might immediately get on with the business.

We have considered that approach, but even as we have considered it we must reject it, for we find no escape from the language of the 1957 Act. As we have already pointed out, Congress did not issue a license; it authorized and directed its established agency to issue the license, and the Commission was ordered to include not only specified conditions but also "those * * * required under the terms of the Federal Power Act". Inevitably, therefore, we are bound to revert to the Commission's January order and its order denying the Tuscarora petition for rehearing, pursuant to which the license was to issue. Accordingly we turn specifically to consideration of the controlling aspect of the question before us, namely, whether or not the license might be issued without a Section 4(e) finding. The answer to that question depends in turn upon the meaning of Section 3(2).

[fol. 84171] IV

The Federal Power Act defines certain words for the purposes of the Act. It provides:[10]

> "'[R]eservations' means national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks". (Emphasis supplied.)

It further provides[11] in pertinent part that "The Commission is * * * empowered * * * [t]o issue licenses * * * for the purpose of constructing * * * reservoirs * * * upon * * * reservations of the United States". Then follows a proviso:

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[10] Sec. 3(2), 41 Stat. 1063 (1920), as amended, 49 Stat. 838 (1935), 16 U.S.C.A. § 796(2).

[11] Sec. 4(e), 41 Stat. 1065 (1920), as amended, 49 Stat. 840 (1935), 16 U.S.C.A. § 797(e).

"*Provided*, That licenses shall be issued *within any reservation only after a finding* by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation". (Emphasis ours.)

The land here in dispute is indubitably "tribal lands embraced within Indian reservations" within the usual meaning of that phrase. But it is argued by the Commission and the Power Authority that the term "reservations" as used in this statute does not include all tribal lands [fol. 8417m] embraced within Indian reservations but only those tribal lands in which the United States owns an interest and which have been withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws. The argument is based upon a construction of the definition in Section 3(2) of the Act. That construction would be that the phrase "owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" describes all the opening terms in the paragraph—*i.e.*, national forests, tribal lands embraced within Indian reservations, and military reservations. The Commission and the Power Authority say that the United States has and has had no interest in these lands. They point to the fact that this land was acquired by the Tuscaroras by purchase in fee simple with money obtained by them from the sale of land in North Carolina. We think that this reservation is one in which the United States has an interest, and the result here reached must be the same as if the phrase "owned by the United States, [etc.]" were not construed as a limitation upon the term "tribal lands [etc.]". The money derived from the sale in North Carolina was handled by the United States on behalf of the Indians and was applied by the United States to the acquisition of this land, which adjoined the reservation already owned and occupied by the tribe. We are not alone in concluding that the Tus-

caroras' reservation clearly is entitled to the protections accorded without distinction to Indian tribal lands elsewhere. In *United States* v. *7,405.3 Acres of Land*[12] Judge Parker laid down the doctrine that the guardianship of the United States over the Indians, which includes protection of the Indians from improper alienation of their lands, constitutes sufficient interest in those lands to require congressional expression of the consent of the United States [fol. 8417n] to such alienation. We concur in that view.[13] Whether under the Constitution's "Property" clause, obviously applicable to Government lands, concededly within Section 4(e) of the Act, or under the "Commerce" clause, predicating Section 21 of the Act,[14] the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here.

The argument of the Federal Power Commission and the Power Authority is that the Power Act allows the Commission to deal with federal land (except national forests and monuments) after a Section 4(e) finding. In that section Congress was exercising its constitutional right to dispose of property held by the United States. By Section 21 of the Act, says the Commission, Congress, acting under the interstate and foreign commerce clause, allowed the Commission to act in regard to non-federal land. Generally speaking, we agree with the Commission up to this point.

But the application of Section 21 to land held in fee simple by Indian tribes presents a special problem, even if such land be deemed to be non-federal land. Dealings with the Indians are within a special clause of the Constitution, conferring power on the Congress to regulate commerce with the Indian tribes. The relationship between the United States and members of Indian tribes resembles

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[12] 97 F.2d 417 (4th Cir. 1938).

[13] We need not go into the complicated ramifications of the nature of Indian reservations depending upon the process of their creation. See, e.g., *United States* v. *Tillamooks*, 329 U.S. 40 (1946); *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

[14] 41 Stat. 1074 (1920), 16 U.S.C.A. § 814

that of guardian and ward. Alienation of Indian lands, a prerogative of the United States as guardian, requires congressional consent. We do not find congressional consent in the 1957 statute or in any other statute except the [fol. 8417o] Federal Power Act. We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with "public lands and reservations" as defined in Section 3(2), Congress was exercising not only its power under the property clause of the Constitution but also its power to regulate commerce with the Indian tribes and, therefore, to allow alienation of the land here involved.

V

On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope. The acquisition is desirable solely from the standpoint of economy; apparently acquisition and construction costs would be lower here than at any other place in the area. We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation.

VI

We have authority to remand to the Commission for further findings.[15]

VII

We are of opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in [fol. 8417p] Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding. If the Commission concludes that the finding can be made and makes

[15] *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364 (1939); *Fleming* v. *Federal Communications Comm'n*, 96 U.S. App. D.C. 223, 225 F.2d 523 (D.C. Cir. 1955).

it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand. In order that the litigation may not be prolonged unduly, our remand order will require that the Commission report to us within fifteen days hereafter regarding its action pursuant to the remand.

So ordered.

[fol. 8417q]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor.

On Petition for Review of an Order of the Federal Power Commission.

Before: Prettyman, Chief Judge, and Edgerton and Danaher, Circuit Judges.

ORDER OF REMAND—November 14, 1958

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On Consideration Whereof, it is ordered by this court that this case is remanded to the Federal Power Commission for further proceedings in conformity with the opinion of this court.

It Is Further Ordered by the court that the Federal Commission report to this court within fifteen (15) days from this date regarding its action pursuant to this remand.

It Is Further Ordered by the court that a certified copy of this order and a certified copy of the opinion shall issue Forthwith to the Federal Power Commission.

Per Chief Judge Prettyman.

Dated: November 14, 1958.

[fol. 8489]

BEFORE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Received December 19, 1958

Intervenor, Certain Named Tuscarora Allotees, request the Federal Power Commission to find the following facts and make the following conclusions of law:

1. That the Tuscarora Indian Reservation comprises 6249 acres of land and is situated in the County of Niagara, State of New York.

2. That the Tuscarora Nation of Indians have continuously resided on the Reservation for more than one hundred and fifty years.

3. The Tuscarora Reservation was acquired for the perpetual use, possession and occupancy of the Tuscarora Nation.

4. That there are in excess of six hundred Indians presently residing on the Tuscarora Reservation.

5. That the Power Authority of the State of New York seeks to acquire 1383 acres of land within the Tuscarora Reservation for use as a reservoir site.

6. That the Tuscarora Nation of Indians in the past has allotted lands of the Nation to members of the Nation for their use.

[fol. 8490] 7. That there are thirty-seven homes within the proposed reservoir site.

8. That more than one hundred persons occupy the thirty-seven homes in the proposed reservoir site.

9. That construction of the proposed reservoir would inundate more than twenty percent of the entire Tuscarora Reservation.

10. That construction of the reservoir on the proposed site would cause the eviction of the allotees residing on the land and deprive them of the use and occupancy of the lands.

11. That construction of the proposed reservoir would be inconsistent with the purpose for which the Reservation has been used in the past.

12. That construction of the proposed reservoir would be inconsistent with the purpose for which the Reservation was acquired.

13. That Congress has not specifically approved or authorized the use of any part of the Tuscarora Reservation, for a reservoir.

[fol. 8491] Conclusions of Law

The license requested by the Power Authority of the State of New York which would inundate 1383 acres of land within the Tuscarora Reservation would be inconsistent with the purpose for which the Reservation was created or acquired.

The Commission cannot issue a license allowing construction of a reservoir on the Tuscarora Indian Reservation without specific Congressional authorization. Such specific authorization has not been obtained.

Respectfully submitted,

Certain Named Tuscarora Allotees, By Stanley Grossman, Attorney for Certain Named Tuscarora Allotees, Office and Postoffice Address, 444 Third Street, Niagara Falls, New York.

Certificate of Service (omitted in printing).

[fol. 8495]

BEFORE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

PROPOSED FINDINGS AND CONCLUSIONS—December 19, 1958

Introductory Statement

The 1950 Treaty with Canada (1 U.S.T. 694) greatly enlarged the amount of water which the United States may divert from the Niagara River above the Falls for hydroelectric development.

A disastrous rock slide occurred at Niagara Falls on June 7, 1956 which destroyed Schoellkopf stations 3-B and 3-C and caused severe damage to Schoellkopf station 3-A of Niagara Mohawk Power Corporation (licensee of Project No. 16). Following the rock slide, Congress enacted Public Law 85-159 (approved August 21, 1957). Section 1 of Public Law 85-159 (71 Stat. 401) "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States' share of the water of the Niagara River permitted to be used by international agreement" and subject to specified conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act." The purposes expressed by Congress in Section 1 of Public Law 85-159, among others, are that power from the project should be made available at the lowest rates reasonably possible for domestic and rural use, and that low cost power from the project should be made available to industries of the area for the same general purposes for which low cost [fol. 8496] power was formerly available from Project No. 16 of Niagara Mohawk Power Corporation prior to the rock slide of June 7, 1956.

After the Schoellkopf disaster of June 7, 1956, the Power Authority developed a scheme for a project which would utilize all of the United States' share of the waters of the Niagara River for power purposes. Earlier schemes contemplated the average use of about 47,500 cfs. through the new project with the continued use of about 20,000 cfs. of water through the Schoellkopf plant (H. Rept. No. 862, 85th Cong. 1st Sess. p. 5). The more recent scheme is embraced in the application of the Power Authority for a license and is substantially the same as the project sponsored by the Power Authority at the Congressional Committee hearings on Public Law 85-159.

The testimony and documentary evidence presented at the further hearings shows that copies of the general plans of this enlarged proposal (with no water use by Schoellkopf) were transmitted to all members of the United States Senate and to all members of the House of Representatives of the United States prior to the enactment of Public Law 85-159. The record on further hearing further shows that copies of this enlarged plan of the Power Authority, including the location of the reservoir, were before the members of the House Committee on Public Works when they were considering H.R. 8643, 85th Cong. 1st Sess., and that copies were before members of the Senate Committee on Public Works when they were considering S. 2406, 85th Cong. 1st Sess. Although the Committee Reports do not describe the location of the reservoir proposed by the Power Authority, it is clear from the record that the project adopted by Congress in Public Law 85-159 to utilize all the United States' share of the water from the Niagara [fol. 8497] River was the proposal submitted by the Power Authority (Exhs. 191, 218). At page 6 of the Senate Report (S. Rept. No. 539, 85th Cong. 1st Sess.) it is said:

> There is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by the Corps of Engineers, the Bureau of Power of the Federal Power Commission, the Niagara Mohawk Power Corporation, and the Power Authority of the State of New York. *The latter organization having made the more recent studies*

which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station. (emphasis added)

Schemes prepared prior to the collapse of the Schoellkopf station provided for an installed capacity of about 1,500,000 kilowatts with a pumped-storage reservoir with about one-half of the capacity of the later plan of the Power Authority which was before Congress. The recent scheme prepared after the Schoellkopf disaster, is described at page 7 of the House Report (H. Rept. No. 862, 85th Cong. 1st Sess.), as follows:

> As a result of the disaster, the redevelopment project will be enlarged so as to develop water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required.

The scheme of the enlarged project as presented by the Power Authority for consideration by the Senate and House Committees on Public Works did not identify the owners of the tracts of the lands on which the project would be located. However, such scheme did show the general location of the proposed project works including the pump-storage reservoir which would be located in part on Tuscarora Indian lands (Exh. 191). The storage capacity of 60,000 acre-feet was also shown in the data submitted in consideration of H. R. 8643, 85th Cong., 1st Sess. (Exh. 218).

[fol. 8498] The Court of Appeals for the District of Columbia Circuit in its decision of November 14, 1958 states that: "During the hearings in 1956, on bills relating to the Niagara Power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company." (Slip Op. p. 5). A statement was made to that gen-

eral effect on June 28, 1956 by a staff member of the Corps of Engineers (Hearings before the Committee on Public Works House of Representatives, 84th Cong. 2d Sess., on S. 1823 and H.R. 11477, at page 12). It appears, however, that the statement related to a much smaller project proposed by the Corps of Engineers. In any event, the statement would have been inaccurate with respect to the enlarged project proposed by the Power Authority which requires lands of several owners in addition to Niagara Mohawk Power Corporation. Of all the lands to be acquired by the Power Authority for the project, about 19 percent had to be acquired from Niagara Mohawk Power Corporation, about 31 percent had to be acquired from the Tuscarora Indian Nation, and about 50 percent had to be acquired from other land owners (Exhs. 18 and 189). Substantial parts of these necessary lands have already been acquired, and about 42 percent of the lands that have been taken were Niagara Mohawk Power Corporation lands (Tr. 4971).

In its decision of November 14, 1958, the Court of Appeals further states that: "Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: 'No dams or provisions for storage of water are necessary.' (103 Cong. Rec. 14438). This testimony related to the project as planned prior to the Schoellkopf disaster, but we [fol. 8499] are not advised that the impression given was ever withdrawn or changed." (Slip Op. p. 5). The statement by Senator Chavez reads, in pertinent part, as follows:

> The Niagara Falls project is potentially one of the greatest hydroelectric power projects on the North American Continent. No dams or provisions for storage of water are necessary. That storage is provided by the Great Lakes which insure a fairly constant regulated flow in the Niagara River. The power head is provided by the fall in the river which is concentrated in the Niagara area. (103 Cong. Rec. 14438)

Obviously Senator Chavez was referring to the well known fact that by reason of the storage in the Great Lakes and the head created by the falls and rapids, no dam

creating a reservoir and power head in the Niagara River was necessary at Niagara Falls. He was not saying that a pumped-storage reservoir was not necessary. Moreover, the smaller projects planned prior to the Schoellkopf disaster provided for a pumped-storage reservoir of about one-half the capacity of that proposed by the Power Authority in its enlarged project (S. Doc. No. 113, 84th Cong. 2d Sess., p. 36).

The Court of Appeals for the Second Circuit, in *Tuscarora Nation of Indians* v. *Power Authority, et al.*, 257 F. 2d 885, decided that by Public Law 85-159 Congress has granted its consent to the taking of Indian land for the project. It may be fairly said that the legislative history supports that conclusion. However, the question was not raised at the first hearing in this proceeding and consequently no evidence was presented with respect thereto prior to the further hearing.

[fol. 8500] The town of Lewiston intervened and opposed the use of approximately 720 acres of land for reservoir purposes. The evidence presented at the first hearing showed that a pumped-storage reservoir having a usable storage capacity of 60,000 acre-feet was necessary for the project. The evidence also showed that it was infeasible to decrease the surface area of the reservoir and increase the height of the dikes and increase the amount of drawdown in order to obtain the necessary 60,000 acre-feet of usable storage (Tr. 3485-86, 3492-94, 4819).

Four representatives of the Tuscarora Indian Nation appeared and testified at the first hearing to the effect that they objected to the use of any of their lands for project purposes but they presented no evidence with respect to the merits of the proposed project (Tr. 2186, 2201, 2207, 2517). The Tuscarora Indian Nation presented no witnesses at the further hearing although it did present documentary evidence principally of a historical nature.

Although maps and drawings presented at the first hearing showed that sufficient lands were available for a possible relocation of the pumped-storage reservoir, no evidence was presented at the first hearing with respect to the practicality of relocating the reservoir so as to

remove it from Indian lands. This question was explored at the further hearing and a large part of the record relates to that question. All possibilities were explored and the only alternative site which has engineering feasibility is described in the record as scheme 4 (Exh. 165). All of the disadvantages of open conduits discussed in the Commission's order of January 30, 1958, with respect to community disruption would be magnified several times over [fol. 8501] by relocation of the reservoir so as to eliminate Indian lands. Consequently, for that reason, and the excessive time and cost involved in any possible relocation, it is recommended that the Commission amend its order of January 30, 1958 to include the following supplemental findings.

Findings

1. The Niagara project is the largest hydroelectric resource in the United States and requires the use of pumped-storage facilities to use economically and efficiently the available water as provided by the terms of the 1950 treaty between the United States and Canada, and as required by Public Law 85-159 (Tr. 1409, 4796).

2. A pumped-storage reservoir of at least 60,000 acre-feet capacity is required to permit the high nighttime and low daytime and weekend flows to be utilized for power generation as needed to meet the high daytime and low nighttime and low weekend power demands of the area. (Exh. 13; Tr. 1409, 4795-6).

3. The elimination of Indian lands from the proposed Tuscarora pumped-storage reservoir site would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet (Tr. 4799).

4. Reduction in the storage volume to 30,000 acre-feet would probably result in a loss of 300,000 kilowatts of dependable capacity, or one-sixth of the total dependable capacity, and would probably increase the cost of firm power from 4¼ mills to 4¾ mills per kilowatt-hour (Tr. 4798-9).

[fol. 8502] 5. Industries at Niagara Falls have advised that if the power supply costs more than 4½ mills they cannot compete with similar industries in other low cost power areas (Tr. 4877).

6. The loss of 300,000 kilowatts of dependable capacity at the Niagara project will require the construction of a comparable size, high-cost steam-electric plant in lieu thereof (Tr. 4797).

7. Licensee has studied in detail five alternative schemes for providing 60,000 acre-feet of pumped-storage reservoir capacity by utilizing other lands in lieu of lands within the Tuscarora Indian reservation; also, licensee has investigated the matters of decreasing the reservoir area and increasing the height of dikes and increasing the amount of reservoir drawdown within the smaller area to provide 60,000 acre-feet of storage capacity (Tr. 3485-86, 3492-94; Exhs. 161-165, inclusive).

8. The record shows that all five alternative schemes which utilize other lands in lieu of the lands within the Tuscarora Indian reservation are neither economically feasible nor in the best interests of the public because of several reasons including excessive cost; excessive time for condemnation and removal of 439 homes, 1 church, 1 store, 1 new school, 1 fire station, and 2 cemeteries, and lack of land upon which to relocate such structures; community disruption and adverse effect on civil defense resulting from construction of the alternative reservoir; and a general delay in the orderly construction of the project resulting in the loss of millions of dollars (Tr. 3989-95, 4000-1, 4003-8, 4306-21, 4042-3, 4744-5; Exh. 189, Exh. 179; Tr. 4321-2, 4342-8, 4467-91, 4526-8, 4507-9, 4527-33, 4732-45, 4755-61, 4864).

[fol. 8503] 9. The least objectionable of the alternative reservoir schemes is scheme 4 but it is unattainable within reasonable time and would result in considerably more community disruption than the previously proposed open waterway which was rejected by the Commission order of January 30, 1958 (Tr. 4005; Exh. 165; Tr. 4342-3, 4742-46, 4755).

10. Decreasing the area of the pumped-storage reservoir and increasing the amount of drawdown in order to provide 60,000 acre-feet of storage capacity was not economically feasible even before the project construction was started (Tr. 2509, 2603-08, 3084, 4819).

11. Decreasing the area of the pumped-storage reservoir and increasing the amount of drawdown in order to provide 60,000 acre-feet of storage capacity is impossible of attainment at this time since the turbines and generators and other equipment for the present design are on order and are being manufactured (Tr. 4814, 4827-8, 4867).

12. To provide 60,000 acre-feet of reservoir capacity outside the area of the Indian lands would require 1,721 acres of much less suitable land for alternate scheme 4 as compared to 1,383 acres of Indian lands (Exhs. 161, 165; Tr. 4361-2).

13. Alternate scheme 4 is much more disruptive to community life than the open waterways which are rejected by the Commission in its order of January 30, 1958, from the points of view of traffic, sewage problems, water supply, fire protection, and school transportation (Tr. 4487-91, 44732, 4738-45, 4755, 4864).

[fol. 8504] 14. With respect to alternate reservoir scheme 4 it would place an unconscionable burden on the power consumers through increased costs and delays because it would take a minimum of two years after titles had been cleared and litigation disposed of to move 439 houses, 2 cemeteries and other facilities (Tr. 4866, 4309-16, 4368, 4389; Exh. 189).

15. The Power Authority has let contracts for the project totalling about $400,000,000 (Tr. 4868).

16. Although the Power Authority can continue at a greater cost the financing of a less desirable project with a smaller reservoir which does not utilize Tuscarora lands (Tr. 4870) the project must have at least 60,000 acre-feet capacity in order to use fully the United States' share of the water (Tr. 4800-2).

17. The Tuscarora Indian reservation consists of 6249 acres of land in the town of Lewiston, of which 1,383 acres or 22 percent are located within the proposed Tuscarora pumped-storage reservoir (Exh. 189).

18. The Tuscarora Indian Nation has about 566 registered members, of which 413 live on the reservation and 153 live off the reservation (Tr. 4693).

19. There are 37 houses and 1 farm (full-time) on the Indian lands within the proposed reservoir site and 180 houses on the Indian lands outside the reservoir site (Tr. 4545-50; Exhs. 203, 204).

20. There are 123 people living in the 37 houses on the Indian lands within the reservoir site (Tr. 4248).

[fol. 8505] 21. One Indian family; Chief Patterson, operates a farm of 630 acres in the proposed Indian reservoir site (Tr. 4247) and there are only five other Indians operating farms in this area on a part-time basis (Tr. 4249). Approximately the remaining half of the land in the Indian reservoir area is not being put to any use (Exh. 227).

22. Based on the 1950 Bureau of Census figures only about 25 percent of the male Indians, or a total of 25 male Indians over 14 years of age, depend on agriculture, forestry and fishing for their livelihood on the Tuscarora Indian Reservation (Exh. 209); many work off the reservation (Tr. 4103).

23. Land within the reservation is leased to white men for farming (Exh. 227) and for trailer sites (Tr. 4095, Exh. 205) outside the area needed for the reservoir.

24. There are 300 acres of swamp land on the reservation outside the reservoir area which can be drained and converted into farm land (Tr. 4007-08).

25. There are 637 acres of land leased to white farmers, 639 acres of abandoned fields and 1,197 acres of land not farmed in 1958, all of which are on the reservation outside of the reservoir site (Exh. 227), making a total of 2,473 acres of land physically available for use as compared with the 1,383 acres of Indian land in the reservoir site.

26. From 1950 to 1957 the number of white people living on the reservation increased from 30 to 211 (Exhs. 206, 208; Tr. 4669).

27. The rental from land on the reservation leased to white farmers is about $2 per acre per year and the 15 trailer sites (180 trailers) yield one dollar a month for each trailer (Tr. 4422, 4453-C, 4095, 4551-6).

[fol. 8506] 28. Easements have been granted for rights-of-way for transmission lines, railroad tracks, telephone lines and roads, by the Indians, all without Federal authorization (Tr. 4113-24).

29. The State of New York furnishes without cost to the Tuscarora Indians and without any Federal aid the following: medical aid, social welfare assistance, fire protection, and education, including a $515,550 school on the reservation (Tr. 4564-72, 4597-9, 4601-3, 4620-1, 4628, 4631-39).

30. The Department of the Interior, within recent years, has not exercised supervisory control over the utilization by the Tuscarora Tribe of the reservation lands (Exh. 215).

31. The appraised value of the land within the reservoir site on the reservation, based on value of similar lands outside the reservation, including improvements thereon, is $980,000, consisting of land valued at $645,500 and improvements valued at $334,500 (37 houses, barns, sheds and greenhouses) (Tr. 4168-9).

32. The record amply shows that the Tuscarora Indian reservation was created and acquired to provide a place for the Indians to have a home and making a living.

33. The reservation is not presently sustaining adequately the Indians within itself and many of the members of the Indian Nation are employed outside the reservation.

[fol. 8507] 34. The receipt by the Tuscarora Indians of just compensation from the licensee as a result of the construction and operation of the reservoir on Indian lands, or for the reasons set forth in the attached letter of December 19, 1958 from the Under Secretary of the Interior (Exh. 217; Tr. 5456), would be consistent with the purpose for

which the reservation was created or acquired, namely; to provide a livelihood for the Indians.

35. A license providing for construction and operation of the pumped-storage reservoir on reservation lands under the conditions stated herein will not interfere or be inconsistent with the purposes for which the Tuscarora Indian reservation was created or acquired.

36. The Niagara project, including the Tuscarora pumped-storage reservoir in the town of Lewiston with approximately one-half of the reservoir occupying lands of the Tuscarora Indian Nation and located adjacent to the pumping-generating plant, the reservoir having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre-feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet, is best adapted to a comprehensive plan for development of the Niagara River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

Conclusions

1. A pumped-storage reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States' share of the water of the Niagara River permitted to be used by international agreement.

[fol. 8508] 2. A pumped-storage reservoir with usable storage capacity of 60,000 acre-feet utilizing higher dikes and a drawdown of more than about 25 feet is not feasible.

3. A pumped-storage reservoir with usable storage capacity of 60,000 acre-feet utilizing 25 feet of drawdown requires among other lands an area of land equal to 1,383 acres within the Tuscarora Indian reservation or 1,721 acres of land outside of the reservation.

4. The land outside of the reservation is much more highly developed than the land within the reservation and consequently the actual economic loss would be smaller if

reservation lands were used for the pumped-storage reservoir.

5. The use of alternate lands for the pumped-storage reservoir in lieu of lands within the Tuscarora reservation would result in considerably more community disruption than the open waterway which was rejected by the Commission in its order of January 30, 1958.

6. The construction cost for project works in order to provide the pumped-storage reservoir would be much less if reservation lands were used instead of other lands.

7. The use of other lands, in lieu of reservation lands, would cause a delay in construction and result in a substantial increase in power costs.

8. The only possible way in which the Niagara project can continue being construced at this time without the use of reservation lands is to substantially reduce the capacity of the pumped-storage reservoir.

[fol. 8509] 9. Reducing the capacity of the pumped-storage reservoir will result in a permanent loss of about 300,000 kilowatts of dependable capacity, or a reduction of one-sixth of the total dependable capacity of the project.

10. In order to be best adapted to the comprehensive development of the Niagara River for power and other purposes the Niagara project must utilize a pumped-storage reservoir of 60,000 acre-feet of storage capacity and must occupy lands within the Tuscarora Indian reservation.

11. The interim ruling of the Court of Appeals issued November 14 described the lands of the Tuscarora Indian Nation which would be taken for the project reservoir as "tribal Indian lands" as that term is used in the definition of "reservation." Section 3 (2) of the Federal Power Act. While we are of the view that the Court has extended the scope of the word "reservations" as long used in federal water power legislation and as defined in the Federal Power Act, and there may not be time within which to seek a ruling by the Supreme Court, we have endeavored to present to the Commission those facts which would enable it to decide

whether it should make the finding called for by the first proviso of Section 4 (e) of the Act as interpreted by the Court, namely, whether the use of these lands for project purposes would interfere or be inconsistent with the purpose for which they were acquired.

12. The conversion of uplands within any reservation for project reservoir purposes would, of course, prevent their use for farming, grazing, woodland or similar purposes for which these particular lands were acquired or similar lands could be acquired. It may be presumed, therefore, that the ownership of farm lands by Indians as tribal lands within an Indian reservation could not of itself preclude the use of the lands for power purposes or Con- [fol. 8510] gress would not have stipulated in the first proviso of Section 4 (e), that project use was to be subject to "such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

13. If the license provisions of the Act are taken as a whole there is full legal authority for the Section 4 (e) finding tentatively required by the Court (finding No. 35 herein). The facts of record would require that it be made if an adequate project is to be obtained as required by Public Law 85-159, and by Section 10 (a) of the Federal Power Act. These questions will be more fully developed at the oral argument.

Respectfully submitted,

Leonard Eesley, Assistant General Counsel. Joseph B. Hobbs, Attorney, Commission Staff Counsel.

Washington, D. C.
December 19, 1958

[fol. 8511]

(Emblem)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Dec 19 1958

Dear Mr. Kuykendall:

This refers further to our letter of November 21, 1958 concerning the issuance of a license to the Power Authority of the State of New York authorizing the Niagara River Power Project.

If our understanding of the recent opinion of the United States Court of Appeals for the District of Columbia Circuit, decided November 14, 1958, is correct, the Federal Power Act may be construed to require your Commission to make a finding, preliminary to the issuance of a license to the Power Authority of the State of New York, as to whether or not the proposed use of part of the lands of the Tuscarora Reservation for water storage can be made consistent with the purposes for which the reservation was created or acquired, taking into consideration the amount of land to be taken, the moving or replacement of buildings within the areas to be flooded, securing of adjacent lands for the use of the Indians and similar factors. The Court has clarified the function of this Department, as the agency of the Government charged with the management of Indian affairs, when they stated that "the relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States".

If the Court is correct in casting us in this role, we must carefully consider the circumstances surrounding any proposed use of the reservation lands to see that the Indians are satisfied that the purpose of the original acquisition of their reservation is not defeated. If the Commission finds that the proposal of the Power Authority includes provisions making it compatible with the purpose of the reservation then the Secretary of the Interior stands ready to

advise in the fixing of compensation for the Indian tribe and to propose conditions necessary for the adequate protection and continued utilization of the reservation consistent with the reservation purpose.

In the meantime, we are continuing our efforts to assist the Tuscarora Indian Nation in reaching an amicable settlement with the New York Power Authority for the use of the area required under some agreement which would guarantee continuing ownership of the reservation lands to the Indians.

[fol. 8512] As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands. The Secretary of the Interior sympathizes with this contention of the tribe and will use every effort to protect their continuing ownership in the lands underlying the storage area and to make provision for lieu lands. The Department of the Interior, in insisting upon favorable consideration for the traditional interests and proprietary rights of the Indians in the lands involved, does not lose sight of the broad need of all the people of the State of New York to obtain the use of these Indian lands for the Niagara River Power Project.

Sincerely yours,

Elmer P. Bennett, Under Secretary of the Interior.

Hon. Jerome K. Kuykendall, Chairman, Federal Power Commission, Washington 25, D. C.

[fol. 8513] Certificate of Service (omitted in printing).

[fol. 8515]

BEFORE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

FINDINGS AND CONCLUSIONS PROPOSED BY APPLICANT

Application was filed August 20, 1956 by Power Authority of the State of New York, Applicant, for a license under Section 4(e) of the Federal Power Act for proposed Project No. 2216 to be located on the Niagara River, an international boundary stream and a navigable waterway of the United States in the County of Niagara, the City of Niagara Falls and the Towns of Niagara and Lewiston in the State of New York.

On August 21, 1957 there was approved Public Law 85-159, 85th Congress (16 U.S.C. § 836) which expressly authorized and directed the Commission to issue a license to the Power Authority of the State of New York for the construction and operation of a power project "with capacity to utilize *all* of the United States share of the water of the Niagara River permitted to be used by international agreement." That Act mandated the Commission to include in the license conditions "in addition to those deemed necessary and required by the terms of the [fol. 8516] Federal Power Act": (1) a preference provision with respect to 50 per centum of the project power, (2) a preference provision with respect to the per centum of project power to be made available for use in neighboring states, (3) a preference provision with respect to sale of project power to the licensee of Project 16, (4) an authorization for the construction of transmission lines, (5) a provision for fixing resale rates by contract, (6) a provision for development of a scenic drive and park on the American side of the Niagara River and (7) a provision for reimbursing the United States for the cost of construction of remedial works.

In the preference provisions there was expressed the intent of Congress that the project was to develop power at low cost so as to make power available to rural and domestic consumers "at the lowest rates reasonably possible" and to "restore low power costs" to industries.

Thereafter, the application filed by the Power Authority on August 20, 1956 was amended so as to make it one also under Public Law 85-159.

On September 19 the Commission issued a license to applicant for Project 2216 leaving the size of the reservoir, and the type of the waterways which were essential parts of the project works for a determination following a hearing on objections which had been filed by several intervenors.

Such hearings were had before an examiner for the Commission commencing on October 1, 1957 and concluding on November 27, 1957. In the course of those hearings the Tuscarora Indian Nation petitioned and was allowed to intervene and representatives of the Nation testified at the [fol. 8517] hearings in objection to the use of any of the land of the nation for the Project.

On January 30, 1958 the Commission issued a final license for the project and licensed among other project works:

> "(4) The Tuscarora pumped-storage reservoir in the Town of Lewiston located adjacent to the pumping-generating plant having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet." (Order Issuing License, p. 9).

The Commission did not approve the specific location of the reservoir which was shown on applicant's Exhibit J but instead required the licensee, not later than July 1, 1958, to file for Commission approval a revised Exhibit J. (Article 33 of Order Issuing License, p. 15).

The land of the Tuscarora Nation of Indians consists of 6,249 acres located in the Town of Lewiston. In response to the objection made by the Tuscarora Indian Nation that it should remain undisturbed in the possession of its land and that the applicant lacks authority to acquire

any part of such land, the Commission, in issuing the aforesaid license, found "the lands of the Indian Nation are almost entirely undeveloped except for agricultural use." The Commission further said that "we do not attempt to pass on that question since other lands are available for reservoir use if the applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

The Tuscarora Indian Nation has contended before the Commission before the license was issued that it was secure [fol. 8518] in the undisturbed possession of the land by treaties with the United States and that it had not been shown that the taking of its land "would, in fact, be less expensive than the taking of alternative lands." In support of the latter contention it asserted that the Indian land involved contained approximately 25 homes and that the alternative land contained 15 homes and a cemetery and that the cost of removing the 25 Indian families would exceed the cost of removing the cemetery and the 15 non-Indian families because the Indian land was tax exempt and had other "unique characteristics" which would make the taking "costlier than the taking of alternative lands."

On February 28, 1958 the Tuscarora Indian Nation applied for a rehearing of the Commission's order of January 30 issuing the license. The application for rehearing was denied by the Commission on March 21, 1958.

In its application for rehearing the Tuscarora Indian Nation contended that lands belonging to it could not be acquired without specific permission from Congress but conceded that "the law is unsettled, however, as to whether general legislation like 16 U.S.C. 814 [Section 21 of the Federal Power Act] constitutes such authority from the United States." It also contended that "the Commission's order, therefore, in effect may be prejudicing petitioner's [Tuscarora's] opposition to the licensee's attempts to acquire its property despite the admonition [of the Commission] that 'we do not attempt to pass on that question.'" [fol. 8519] The Tuscarora Indian Nation also contended for the first time that its land constituted a reservation within the meaning of Section 4(e) of the Federal Power Act and that the license was defective in that the Commission had

not made a finding required by that section "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."

In denying the motion for rehearing the Commission said:

> "The question of whether the licensee is empowered to acquire intervenor's [Tuscarora's] land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question."

After quoting a letter addressed to the Tuscaroras by the Assistant Secretary of Interior to the effect that the land of the Tuscarora Indian Nation is "under state Jurisdiction" the Commission held that "since intervenor's lands are not within an Indian reservation under the supervision of the Secretary of Interior they are not part of a 'reservation' referred to in Section 4(e) as defined in Section 3(2) of the Act and the finding suggested by the intervenor is not required."

After the license had been issued, the licensee in February took steps to acquire 1383 acres of land of the Tuscarora Indian Nation pursuant to State procedures. The Nation challenged its right to do so by an action in a United States District Court for an injunction against the licensee and a declaratory judgment that the licensee had no right to acquire the Nation's land. The United States District Court for the Western District of New York [fol. 8520] dismissed the Nation's action, holding that the Power Authority had the right to acquire the land pursuant to the State's eminent domain procedure known as appropriation. (*Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 107). On Appeal, the United States Court of Appeals for the Second Circuit modified the judgment of dismissal by declaring the rights of the parties to be that the licensee was authorized to acquire the land involved in accordance with the procedures specified in Section 21 of the Federal Power Act (16 U. S. C. §814) but that it was not thereby authorized to acquire the land by the State appropriation

procedures. (*Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885). In other words, the Court of Appeals for the Second Circuit held that the Power Authority had the right to acquire the land but that it could do so by one procedure rather than another. The United States Court of Appeals for the Second Circuit denied the Nation's motion for rehearing (Id. 257 F. 2d 895) and the Supreme Court of the United States denied certiorari. (3 L. ed. 2d 76).

In holding that the licensee is authorized to exercise the right of eminent domain according to the procedures specified in Section 21 of the Federal Power Act, the Court of Appeals for the Second Circuit necessarily held that the land involved is not a reservation within the meaning of that word in Section 4(e) as defined in Section 3(2) of the Federal Power Act and that therefore the license was not invalid for want of a finding that it "will not interfere or be inconsistent with the purposes for which [fol. 8521] such reservation was created or acquired."

Following that determination the licensee began proceedings in the United States District Court for the Western District of New York to condemn the land pursuant to the provisions of Section 21 of the Federal Power Act. In the course of that proceeding, which is still pending, that Court on September 15 granted the licensee possession of 85.6 acres of the land involved for the purpose of building transmission lines and on October 29 granted the licensee possession of all of the remaining land involved except that used for dwelling purposes, upon deposits with the Court of sums totaling $2,000,000.

In the meantime, the Commission issued an order on May 5, 1958 approving revised Exhibit J which had been submitted by the licensee on May 1 in compliance with Article 33 of the License. This exhibit showed the location of the reservoir partly on land of the Tuscarora Indian Nation.

On May 16 the Tuscarora Indian Nation filed a petition in the United States Court of Appeals for the District of Columbia to review the Commission's order of January 30. It did not seek a rehearing or a review of the May 5th order. On June 25 the Commission certified and filed in that

Court a transcript of the record upon which its orders of January 30 and March 21 were based.

On November 14, 1958 the United States Court of Appeals [fol. 8522] for the District of Columbia Circuit remanded the case to the Commission and in a memorandum stated, among others, the following propositions:

"During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company. Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: 'No dams or provisions for storage of water are necessary.'" [103 Cong. Rec. 14438 (1957).]

"As a matter of fact the Federal Power Commission did not understand when it issued its license order of January 30, 1958, that the taking of these reservation lands was necessary for the project or that it was authorizing the taking of such lands. In its order the Commission referred to the objection of the Tuscaroras to the use of their land for reservoir purposes and said: 'However, we do not attempt to pass on the question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive.'"

"We conclude on this point that Congress did not in the special statute consent to or authorize the taking of this Indian land for this project."

"The land here in dispute is indubitably 'tribal lands embraced within Indian reservations' within the usual meaning of that phrase. But it is argued by the Commission and the Power Authority that the term 'reservations' as used in this statute does not include all tribal lands embraced within Indian reservations but only those tribal lands in which the United States owns an interest and which have been withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws. The argument is based upon a construction of the definition in Section 3(2) of the Act. That construction would be that the phrase 'owned by the United States, and withdrawn, reserved, or withheld from private appropriation and

disposal under the public land laws' describes all the opening terms in the paragraph—*i.e.*, national forests, tribal lands embraced within Indian reservations, and military reservations. The Commission and the Power Authority say that the United States has and has had no interest in these lands. They point to the fact that this land was acquired by the Tuscaroras by purchase [fol. 8523] in fee simple with money obtained by them from the sale of land in North Carolina. We think that this reservation is one in which the United States has an interest, and the result here reached must be the same as if the phrase 'owned by the United States, [etc.]' were not construed as a limitation upon the terms 'tribal lands [etc.]'."

". . . Whether under the Constitution's 'Property' clause, obviously applicable to Government lands, concededly within Section 4(e) of the Act, or under the 'Commerce' clause, predicating Section 21 of the Act [41 Stat. 1074(1920), 16 U.S.C.A. § 814] the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here."

"On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope."

"We are of opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act."

That proviso reads as follows:

"Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The Court remanded "the case to the Commission that it may explore the possibility of making that finding" and stated:

> "If the Commission concludes that the finding can be made and makes it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand."

[fol. 8524] In compliance with the order of the United States Court of Appeals for the District of Columbia Circuit and pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Public Law 85-159 and by Federal Power Act, Sections 4(e) and 308, and the Commission's Rules of Practice and Procedure, the Commission gave notice to all the parties to the proceeding that a further public hearing would be held commencing on November 24 upon the questions presented. Following the hearing the Commission, on motion of the licensee, made an order waiving and omitting its intermediate decision procedure and for a final decision by it on the case. This order was based on a finding on the record that due and timely execution of the Commission's functions imperatively and unavoidably so require.

By letter dated November 21, 1958 the Secretary of the Interior further reported on the application for license as follows:

> "This is in response to Acting Chairman Kline's letter of November 17 relative to Project 2216, Power Authority of the State of New York.
>
> "Mr. Kline's letter requests a report from this Department within the contemplation of Section 4(e) of the Federal Power Act stating what conditions are deemed necessary for the adequate protection and utilization of the area involved lying within the Tuscarora Reservation.
>
> "You are aware, of course, that in commenting to the Commission upon the pending application at an earlier stage of this case, this Department had proceeded

under an assumption that the Tuscarora lands were [fol. 8525] not a "reservation" within the definition of that term as set forth in Section 3 of the Federal Power Act. Moreover, the Department has not, in fact, within recent years exercised supervisory control over the utilization by the Tribe of the Reservations lands.

"Please be assured that this Department is proceeding at once to give the question of conditions its immediate attention. We hope that this Department—concurrently with the deliberations of the Commission on the issue of interference or inconsistency with the purpose for which the Tuscarora Reservation was created or acquired—will be in a position to advise you of the results of its review."

The Court of Appeals for the District of Columbia Circuit having held that the land owned by the Tuscarora Indian Nation is a reservation within the meaning of that word in Section 4(e), as defined in Section 3(2) of the Federal Power Act,

The Commission Finds, in Addition to the Findings Included in its Licensing Order of January 30, 1958:

[fol. 8526] I.

Project 2216 in order to be best adapted to a comprehensive plan for improving and developing the Niagara River, as required by Section 10(a) of the Federal Power Act, must include a pump storage reservoir of 60,000 acre foot capacity.[1]

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[1] In its January 30, 1958 order the Commission directed that the project features include:

"(4) The Tuscarora pumped-storage reservoir in the Town of Lewiston located adjacent to the pumping-generating plant having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet;" (p. 9)

and specifically stated that "approximately that amount of capacity is required to properly utilize the water resources involved here (p. 3)."

[fol. 8527] II.

Project 2216 must include a 60,000 acre foot reservoir in order to comply with the requirements of Public Law 85-159. These requirements are: (a) that the project be capable of utilizing all the water of the Niagara River available under international agreement, (b) that it produce power for sale to preference customers at the lowest possible cost, and (c) that it restore to industry as nearly as possible low-cost power which had been lost as a result of the Schoellkopf disaster in 1956. On the basis of representations made to the Congress, the Congress assumed and intended that the project would have a firm capacity of 1,800,000 kilowatts and would be constructed on the basis of sound engineering principles; in order that these assumptions and intentions be carried out, it is necessary that the project include a 60,000 acre foot reservoir.*

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*At hearings conducted by the House Committee on Public Works in 1956 (Public Document 84-22) (Item VI), testimony was given by representatives of the Army Engineers with respect to a plan of development indicated on a map showing a storage reservoir of 30,000 acre feet containing about 1,200 acres, and by a representative of the Power Authority by reference to a model which was in the hearing room showing a reservoir of about 40,000 acre feet covering about 1,700 acres. The Federal Power Commission's Bureau of Power had prepared a report which showed a reservoir of 22,000 acre feet occupying an area of 850 acres. (R. 4893, 4894, 4930, 4949, 4953)

These hearings were conducted only three weeks after the destruction of the Niagara Mohawk Schoellkopf plant which, under plans prepared up to the time of the hearing, was to continue to utilize about 20,000 cubic feet per second of water available to the United States under the 1950 treaty. (R. 4953) The testimony at those hearings indicated that the plans would have to be revised to increase the scope of the project in order to utilize all of the water of the Niagara available to the United States, including the 20,000 cubic feet theretofore used by the Schoellkopf plant. (R. 4950) While there was some testimony on the part of Army Engineers to the effect that Niagara Mohawk Power Corporation "gen-[fol. 8528] erally" owned all the land needed for the smaller project, this testimony was directed at an earlier plan of the U.S. Army Engineers with a different system of waterways located in areas different from those in Project 2216. Even with respect to that earlier plan the testimony was incorrect. The testimony of the

[fol. 8530] III.

It is not practical or feasible to construct a 60,000 acre foot reservoir without use of Tuscarora land. A reservoir built on the only alternative location adaptable from an en-

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Power Authority witness made it clear that Niagara Mohawk Power Corporation did not own all the land needed for the Power Authority's project even as previously conceived, but that the Power Authority would condemn the land from whomever owned it, whether it be Niagara Mohawk or any other entity. Actually Niagara Mohawk owned only 42% of the land needed for Project 2216. (R. 4896-4904, 4970-4971).

The Senate Public Works Committee held hearings in April, 1957 (Item IV) (R. 4884). By this time the Power Authority had materially changed its plans by enlarging the scope of the project so as to utilize all the water of the Niagara available to the United States and increasing the size of the project features. It had prepared exhibit 191 which was published in newspapers and sent to Indians whose attention was called to the fact that the document showed their land to be within the project area. This was shown by testimony of witnesses and by a document presented to the Committee and "duly made a part of record" of that hearing (Exhibit 191). The testimony and this exhibit showed (1) that the project then being discussed and now known as Project 2216 would have an installed capacity of 2,190,000 kw, a dependable capacity of 1,800,000 kw, a total energy output of 13,000,000,000 kwh, a dependable energy output of 10,700,000,000 kwh; (2) that the industries in the area were suffering badly from the fact that they no longer had for their use the cheap power formerly produced by the Schoellkopf plant which had brought the electrometallurgical and electrochemical industries to Niagara (Sen. Hearings pp. 33-34, 76); (3) that in order to stay in the area industry needed to be able to buy power for a maximum of 4.5 mills (id. p. 72); (4) that the project as planned by the Power Authority would produce power for about 4 mills (id. p. 75); (5) that in order to do this a reservoir was necessary; (6) that the reservoir would be built in open country; and (7) that the reservoir was on the outskirts of the City of Niagara Falls. Exhibit 191 showed the actual location of the reservoir, including Tuscarora land, although it was not labeled as such on the exhibit. The only "open country" upon which the reservoir could possibly be built includes Tuscarora land. The Committee was told that the project would be built according to sound engineering principles and was advised that that was a matter for the Federal Power Commission to pass upon (R. 4905, 4911-4913, 4919-4921, 4926, 4967-4968, 5513-5514).

A document addressed to the House Committee on Public Works in July 1957 prior to passage by either house of Public Law 85-159,

gineering standpoint would involve the following: (1) a delay in construction of two to three years; (2) great disruption of the community including the cutting in two of the Town of Lewiston by a large body of water which cannot be bridged, the elimination of a main highway, the destruction of utilities, the removal of approximately 450 homes and two cemeteries, and the destruction of a million dollar school; and (3) added cost which would amount to

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copies of which were also submitted to the Senate Committee on Public Works, showed that the storage reservoir would have a capacity of 60,000 acre feet (Exhibits 218, 219, R. 4872, 4879, 4881, 5516-5517).

[fol. 8529]

The reports of both committees recommending passage of Public Law 85-159 referred to the fact that the project would contain a storage reservoir and indicated the concern of Congress that the project be built as quickly as possible in order to relieve the emergency caused by the Schoellkopf disaster (Items II, III). It is clear that what Senator Chavez meant when, in the course of the debate on the Niagara bill, he said there was not to be a "reservoir," was a reservoir created by damming up a river. The Great Lakes constitute the reservoir in that sense but the provision of the 1950 Treaty with Canada makes a pump storage reservoir absolutely essential (R. 5300).

Statements in the committee reports and in the debates on the floor indicated concern that the project be built as quickly as possible so that power could be produced cheaply. An actual representation was made in the Senate by Senator Javits that the project would have a firm capacity of 1,800,000 kw on a 17-hour firm basis (Cong. Rec. Vol. 104, Part 130 p. 14,444, 85th Cong. 1st sess.).

As the Examiner said at the hearing (R. 5519):

> "In the report of the Senate Public Works Committee on S. 2406 (Senate Report No. 539, dated June 27, 1957, first session of the 85th Congress), page 6, it was said:
>
> > . . . there is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by (among others) the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station.
>
> "These 'more recent' studies are reflected by exhibits introduced in this hearing which show that the reservoir proposed by these plans envisioned the taking of Tuscarora Indian lands even though not specifically so stated."

over $20,000,000, exclusive of the cost of delay in completion. As a result it will be impossible for the Commission to find, as it is required to do by Section 10(a) of the Federal Power Act, that the project with a reservoir built on the alternative site would be best adapted to a comprehensive plan for improving and developing the Niagara River.[3]

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[3] Among the factors which control the location of the reservoir are topography (Exhs. 188, 190), the proximity of the Niagara escarpment where the land drops off from 150 to 200 feet at once and in which there are fissures through which water would drain (R. 4000-4002, 4321), a stone quarry which because of its depth is a potential leak hazard (R. 4003-4004), the necessity for a surge basin between the reservoir and the main power plant (R. 3990, 4005), the present location of the main line of the New York Cen- [fol. 8531] tral Railroad (Exhs. 188, 190) whose relocation would not be practical for many reasons including the fact that its existence in its present state is a key part of the railroad highway grade crossing elimination program currently being carried on in this area (R. 3989-3990, 4386-4387, 4864-4865).

The record contains testimony about four alternative sites for the reservoir which were studied (Exhs. 162, 163, 164, 165). Only one of the proposed alternate schemes is possible from an engineering standpoint (Exh. 165; R. 3992-4002). This alternate scheme is also shown on Exhibit 189 a copy of which is attached hereto for the convenience of the Commission. This one plan would increase the cost of constructing the reservoir by $3,500,000 (R. 4008-4009, 4043), the cost of transmission lines by $600,000 (R. 4020-4021, 4042-4043, 4291-4293), and the cost of land to be acquired by $12,800,000 (R. 4050). Very large additional expense would be incurred in relocating houses and other buildings (R. 4053, 4507-4509, 4533) and cemeteries (*infra*). Because of topography it would require 1721 acres of non-Indian land to replace 1383 acres of Indian land (Exh. 189; R. 4312). It would involve the destruction of about 440 homes as against 37 if Tuscarora land is taken (R. 4052, 4054, 4167, 4187; Exhs. 179, 180, 188, 189, 203). The two cemeteries which would have to be removed contain over 3000 graves (R. 4321-4322, 4389; Exh. 179, photo. Nos. 3738, 3756; Exh. 180, photo. No. 3777) representing a relocation expense of about $400 per grave (R. 4389). A new school which would have to be destroyed because it cannot be moved (R. 4509) was built at a cost of $1,000,000 (R. 4743) and contains 15 classrooms for 395 pupils and is about to be increased in size to accommodate 400 more students (R. 3880, 4307, 4471; Exh. 179, photo. Nos. 3741, 3742; Exh. 180, photo. Nos. 3772, 4369). The Saunders Settlement

[fol. 8533] IV.

Tuscarora land is necessary for Project 2216. If it is not available the size of the storage reservoir must be re-

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Road which bi-sects the alternate site is the main state highway from Niagara Falls to the county seat at Lockport (R. 4309, 4743). Use of the alternate site would make it impossible for the Town of Lewiston to carry out its present plans for extending a water supply system from the southeast part of the town—by gravity—to the northeast and northwest parts of the town (R. 4467-4468, 4743); would cause a further decrease in the Town's assessed valuations of 9% (R. 4731-4732, 4775) and would interfere with its fire protection system (R. 4468, 4737-4738).

In the Fall of 1957 the Commission held hearings on the objections of the local municipalities to the Authority's then plan to build a waterway from the Niagara Falls city line 6,000 feet to the Tuscarora pump generating station forebay as an open canal (F.P.C. Orders of Sept. 12, 1957, Oct. 25, 1956, Nov. 1, 1956, Jan. 30, 1957, p. 3). In order to avoid the community disruption which this would [fol. 8532] have brought about, the Commission ordered the Authority to substitute covered conduits for the open canal in that section of the waterway (F.P.C. Order of Jan. 30, 1957, pp. 8, 15). It did this despite the fact that the open canal would have been bridged at one point definitely and the Authority would have engaged to build other bridges as they were needed (Exhs. 27, 67; R. 474, 476, 4754-4755). Use of the alternative site for the reservoir (Exh. 165) would cause greater community disruption than the open canal would have caused (Exh. 202; R. 4341-4343, 4864, 4467-4469, 4484, 4488-4489, 4755). It would not be possible to bridge the reservoir nor would it be possible to bring utility lines above or under it as would have been in the case of the waterway (R. 4488-4489, 4755-4756). The Commission, by ordering the Authority to change its plan of waterway added approximately $25,000,000 to the cost of the project and thus increased the cost of power (F.P.C. Order, Jan. 30, 1958, pp. 4, 6-7). A further increase in these costs is not justifiable (16 U.S.C. 836(b)(1)(3); see Finding H, *supra*). Use of the alternative reservoir site would delay completion of the project two to three years because of the difficulties involved in finding new sites for the homes which would have to be moved and the difficulties of getting people out of them and moving them (R. 4508, 4866). Any delay in the cost of the project once it was started would result in overall increase in project costs because of the item of interest in construction alone amounting to over $70,000 a day and would also cost the power users of the area approximately $100,000 a day because power would not be available to them (R. 4946-4947). See R. 3894, 3958.

duced with a consequent reduction in the number of acre feet available for storage purposes. This will result in a reduction in the firm capacity of the project and an increase in the price at which power can be sold.[1]

[fol. 8534]

V.

No part of the Tuscarora Reservation was created or acquired by virtue of any treaty, Presidential Executive Order or Act of Congress. Hence, the purposes for which it was established must be spelled out from the circumstances under which the reservation came into being.[2]

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[1] Since alternative land is not practically available the size of the reservoir must be decreased to about 1,400 acres unless Tuscarora land is used (Exhs. 165, 189, 202). This will reduce the storage capacity to about 30,000 acre feet (R. 4799). With that amount of storage there will be periods when the flow of the river is so high that machinery at the Lewiston Power Plant will not be capable of utilizing all of it (R. 4796, 4802). Lacking sufficient storage part of the water must go to waste (id.).

In order to have a dependable capacity of 1,800,000 kw, the project needs a 60,000 acre foot reservoir in which to store water nights and weekends (R. 4795-4800; 4802; 4808). It has been estimated if the storage capacity is reduced to 30,000 acre feet the firm capacity of the project will be reduced to 1,560,000 kw and the price at which power can be sold will be increased from 4¼ to 4¾ mills (R. 4799). While detailed studies may indicate that a 30,000 acre foot reservoir will produce a somewhat higher firm capacity and that therefore the price of power will not be increased to that extent, it is certain that with a 30,000 acre foot reservoir the project will have a firm capacity of substantially less than 1,800,000 kw (R. 4797; 4808). (See also R. 4870-4877, 4882, 4972, 4955.)

[2] The Tuscarora Reservation was not created or acquired by statute or by executive order of the President (Exh. 228, p. 1; 250, p. 4; R. 5277, 5323). The United States has never held title to any part of it (R. 5351, 5359). The reservation was not created by and is not protected by any treaty of the United States (R. 5277).

Article 2 of the 1784 Treaty of Fort Stanwix (7 Stat. 15) specifically mentioned the Oneida and Tuscarora nations, but only to insure that these tribes could keep the lands upon which they were then settled in the Oneida country in central New York and not be forced to move to western New York (R. 5259, 5260, 5261-5262). By Article 3 of the 1784 Treaty, the Six Nations yielded to the

[fol. 8536]

VI.

Right of occupancy to two parcels containing 640 and 1280 acres, respectively, of the present reservation was ceded in 1799 to the Tuscarora by the Holland Land Company which then owned the land outright, Indians possessory rights to the area having already been validly extinguished. The Company retained ownership of the

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United States all land within four miles east of the Niagara River (7 Stat. 15; R. 5262; Exh. 239). This included the only land in Western New York upon which any Tuscaroras were then settled (Parcel A; Exh. 239; Exh. 233, p. 510). The treaty therefore did not guarantee that land to the Tuscaroras (R. 5262-5264).

Article 2 of the 1794 Treaty of Canandaigua guaranteed possession of lands in central New York to named tribes not including the Tuscarora (7 Stat. 44; R. 5266-5267). Article 3 of that treaty guaranteed to the Seneca occupancy of all of what is now the Tuscarora reservation (R. 5267-5270). In 1797, by the so-called "Treaty of Big Tree," the Seneca sold their rights in all the land contained in the present reservation, i.e., in all of parcels A, B and C (Exh. 231), as the 1794 Treaty contemplated that they might, to grantees of the State of Massachusetts (R. 5142-5147). This so-called "treaty" (which was in essence merely a sale and purchase between [fol. 8535] the Senecas and Morris) extinguished all Indian rights and all treaty protection of all of the land in the present reservation and, of course, of millions of acres of other land in Western New York (R. 5157; 5270-5272). A copy of Exhibit 231 which shows parcels A, B and C is attached hereto for the convenience of the Commission.

The Tuscarora Reservation consists of three parts, designated as Parcels A, B and C on Exhibit 231.

The events leading to the Tuscaroras' acquisition of rights-of-occupancy in Parcels A and B were as follows:

Under the 1786 Hartford Compact between New York and Massachusetts the underlying fee and the right to buy out the Indians' interest was agreed to belong to Massachusetts, as successor to the King of England, and New York was agreed to possess sovereignty over the area (R. 5153-5155). The 1794 Treaty of Canandaigua (7 Stat. 44) between the United States and the Six Nations specifically recognized that the Seneca Indians and only the Seneca Indians had possessory rights in the Western New York area which includes the reservation (R. 5158-5159). By 1794 Massachusetts had sold the fee and preemptive rights to this land to Robert Morris (R. 5156), who in turn had sold it to the Holland Land Company (R. 5158), with the understanding that he would buy out the

underlying fee and the right to reclaim possession in the event the Tuscarora ever ceased to use the land.[7] The purpose of the Tuscarora in petitioning the Company for permission to have use of the land and the purpose of the Company in granting such use was to provide the Tuscarora with a place to live and to sustain themselves by agriculture.[8]

[fol. 8538] VII.

The Tuscarora purchased fee title to the remaining 4,329 acre parcel of the reservation from the Holland Land Company in 1804 through the agency of Henry Dearborn, Secretary of War. Dearborn took a deed to the property from the Company in his own name and in turn granted the Company a purchase money mortgage. He agreed to

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Seneca's property rights in the Western New York area (R. 5271). [fol. 8537] In 1797 Morris bought the Indian rights at the "Treaty of Big Tree" (R. 5142-5147) except that certain clearly denominated parts which were reserved to the Senecas (R. 5157). None of the present Tuscarora Reservation was so reserved (R. 5158; 5250). As a result of the 1797 transaction, unencumbered fee title in the land on which the reservation is located passed to the Holland Land Company (R. 5158).

In 1798 it was brought to the attention of the Holland Land Company that the small Tuscarora group who were squatting on some of the Company's land in Niagara County had been forgotten at the Treaty of Big Tree (Exh. 232A; R. 5159-5160). The Company decided to allow them to continue to live on the square mile known as Parcel A (Exh. 232B; R. 5160-5162). By this time, however, the original group had been increased by others who had come from Central New York and they had spilled over onto Parcel B (*id.*). The Company decided to allow them to have a second square mile—the northern half of Parcel B—but upon a petition from the Tuscarora, finally allowed them to have a total of three square miles (Exhs. 232C, 232D, 232E; R. 5162-5165). This is all of Parcel A and Parcel B.

[7] There was no formal conveyance, but there was a definite understanding that the underlying fee and right of reverter would remain in the Company (Exhs. 232A, 232C).

[8] Exhs. 232D, 232E, 232P; R. 5166.

reconvey the property to the Tuscarora or their designee when payment, which was to be made from the proceeds of the sale of Tuscarora rights of occupancy in North Carolina lands was completed.[9] An agent who had been appointed by Dearborn to assist the Tuscarora in the sale of their North Carolina land did succeed in collecting for it and as he did so, turned the proceeds over directly to the Holland Land Company or to Dearborn to be transmitted to the Holland Land Company. In any event the funds were never deposited in the Bank of the United States as first suggested by the Tuscarora. When the Company was paid in full, Dearborn deeded the 4,329 acres to the Tuscarora Nation and advised them to petition the New York State Legislature for permission to hold their

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[9] Prior to 1804 the Tuscarora Nation had rights of occupancy in certain land in North Carolina which, with the assistance of Henry Dearborn (the Secretary of War) and a man named Davie, who had been appointed by Dearborn to be agent both for the Tuscarora and the State of North Carolina, the Nation sold to third parties for $15,000 (Exh. 232M). On the basis of the promised payment for such rights the Nation purchased Parcel C of Exhibit 231 (Exhs. 232 F, G, I, K, M, N, O, P, Q, R, 5109-5121). The Holland Land Company deeded Parcel C of Exhibit 231 to Dearborn in deed dated November 21, 1804, recorded in Liber B, Pgs. 2-7 Niagara County Clerk's Office, Lockport, New York. By this conveyance the Holland Land Company conveyed the land to Dearborn in trust for the Tuscarora and was to receive and did receive a purchase money mortgage issued by Dearborn to assure the payment of installments of the purchase price. The conveyance required Dearborn to reconvey the land upon payment of the purchase price

> ". . . in fee simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct or appoint" (Exh. 232S; R. 5121-5123).

The documentary evidence cited and referred to in footnotes 9 and 10 establishes that the role of the said Henry Dearborn, although designated as trustee was not actually or legally that of a trustee but merely a conduit to enable the Tuscarora Nation to convey the funds received for the sale of its lands in North Carolina to the Holland Land Company for the purchase of the said 4329 acres, and to enable the Company to secure a purchase money mortgage to secure payment.

land in a national capacity.[10] After the land had been taxed for several years, the Tuscarora did petition the New York Legislature to declare it to be tax-free and in 1821 legislation granting the request was enacted. There was no Act of Congress involved except the general statute (1 Stat. 49) which established the Department of War and prescribed that the Secretary of the Department would have such duties as were assigned to him by the President in [fol. 8539] connection with the waging of war and dealing with Indians. Both in assisting in the sale of the North Carolina land and the purchase of the Niagara County land, Dearborn acted as the result of requests made by the Tuscarora for advice and help.[11] The purpose of the

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[fol. 8540]

[10] As payment was received by Davie for the Tuscarora land in North Carolina, he remitted the same either through Dearborn or directly to the agent of the Holland Land Company, Mr. Joseph Ellicott. These payments were noted on the mortgage (R. 5122, 5134-5136, 5239, 5252-5253; Exhs. 232 q, r). When the entire purchase price was paid, the said Dearborn conveyed the Parcel C to the Tuscarora Nation by deed of conveyance dated January 2, 1809 reported in Liber A, pg. 5, Niagara County Clerk's Office, Lockport, New York. The said deed contained the following phrase:

> "Have granted bargained sold aliened enfeoffed and confirmed and by these presents Do grant bargain sell alien enfeoffed release and confirm unto the said Tuscarora Nation of Indians and their successors and assigns forever All the said thirteen several lots, etc. etc." (Exh. 232U; R. 5121-5123).

On the same day that Dearborn conveyed Parcel C to the Tuscarora Nation by deed, he addressed a letter to Erastus Granger, the Indian agent for Indians in Western New York appointed by the War Department (R. 5118) wherein he said he had "executed a deed to the Tuscarora nation of the lands purchased for them of the Holland Land Company," was forwarding it to Granger to be recorded and "it would be well for you to aid the nation in a petition to the legislature of the state of New York to hold their lands in a national capacity" (Exh. 232T; R. 5123-5124).

[11] From 1809 to 1821 the parcel purchased by the Nation from the Holland Land Company was taxed by the Town of Lewiston, but the parcels on which they were living by sufferance of the Holland Land Company were not (R. 5130-5132; Exhs. W and X). On petition of the Tuscarora chiefs in 1821 the Legislature of the State of New York enacted Chapter 146 of the laws of that year exempting from taxation the land the Tuscarora had purchased from the Holland Land Company (Exhs. 232 W and X; R. 5130-5132).

Tuscarora in acquiring the new land was similar to the purpose for which the original 1,920 acres had been set aside for them. It was to acquire additional land on which to live to sustain themselves by agriculture.[12]

[fol. 8541] VIII.

Thus, the purposes for which the entire reservation was established were residential and agrarian.[13]

[fol. 8542] IX.

It was the intention of the Congress in providing that "licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" that the interference or inconsistency mentioned had to be unreasonable. In order to determine whether the taking would unreasonably "interfere" or be "inconsistent", it must be determined whether the amount of reservation remaining after the taking is adequate to accomplish, now and in the foreseeable future, the purposes for which the reservation was established. In making such determination it is necessary to consider the use to which it was put in the past, the uses now being made of it, the method of administration of the reservation and of the parcels of land in it, the treatment by the members of the Nation of the land allotted to them, the amount of tribal or common land in the reservation, the services rendered to its inhabitants by the State or Federal government, the degree to which the original purposes of the reservation have been accomplished, the degree to

[12] The Tuscarora sold their right of occupancy to land in North Carolina in order to purchase lands from the Holland Land Company "*adjacent to the land on which they then resided*" in New York State by sufferance of the Holland Land Company (Exhs. 232 F, I, K, L, N, O). The reason they purchased that was "they have greatly declined hunting, and are becoming agriculturists" (Exh. 232P); "hunting had ceased to be an important means of support" (R. 5245); and "they needed this additional land for agriculture" (R. 5246).

[13] See footnotes Nos. 8 and 12, *supra*.

which the carrying out of those purposes has been affected by the economic and social changes of the ensuing years, and the extent to which the compensation to be received for the land taken might be used for furthering the purposes of the reservation."[14]

[fol. 8544] X.

When the reservation was first established, the Tuscarora lived in wigwams and were learning the white man's way of earning a living through agriculture.[15] Having recently abandoned a nomadic state, all the land was held in a common or tribal fashion. As the members of the Nation became more and more addicted to agriculture, specific parts of the land were permanently divided among them. This was done first pursuant to tribal custom but it received the imprimatur of New York State law as early as 1854. None of the land was subject to allotment under Fed-

[14] That any taking of land is not necessarily an interference is indicated by the fact that the statute provides that the department [fol. 8543] supervising such reservation may make conditions necessary for the adequate protection and utilization of such reservation. This must necessarily imply that some takings will not "interfere." Furthermore, it is now the law of the case that not every taking will "interfere," because the Court of Appeals for the District of Columbia Circuit, on December 12, 1958, denied the motion of the Tuscarora Nation to enter judgment of reversal at once. The motion was made on the ground that no statutory finding can possibly be made here in the face of the taking contemplated. The denial of the motion is a holding that there can be circumstances under which such a taking can permit the statutory finding that the taking does not "interfere."

Besides, the Commission has in three separate instances (Wisconsin Power & Light Company, Project 710, 7 F.P.C. Annual Report 88, 134, 8 F.P.C. Annual Report, 64-65, 90-91, 182, 192, 10 F.P.C. Annual Report 145; Unitah Power & Light Company, Project 190, 11 F.P.C. Annual Report 163) found that taking of Indian land on reservations for power purposes did not "interfere" and was not "inconsistent." Such findings would have been impossible unless a reasonable interpretation had been given the statute; otherwise any taking of any minimal amount of land would have to have been held to "interfere or be inconsistent."

[15] Exhibits 232 D. E. See also footnotes Nos. 8 and 12 *supra*.

eral statutes. The process of allotting the land was carried out to such an extent that at present the only land left in strictly tribal ownership consists of a swamp of about 350 acres, a wood lot, the land underneath the only building owned in common by the tribe, (the gymnasium) and the national farm, consisting of 29 acres." This farm was once

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* N. Y. L. 1854 Ch. 175; R. 4098-4099, 4133, 4700-4702, 4718, 5359. The Tuscarora Lands could not have been allotted under federal law since no part of the reservation was created or acquired in a "federal" manner; i.e., by treaty stipulation, Act of Congress or Executive Order (25 U.S.C. § 331) (R. 5229, 5376). Under the federal statute, once land has been allotted, it loses its status as "common" or "tribal" land. Lands allotted pursuant to that statute may be condemned for any public purpose in the same manner as lands owned in fee, money awarded as damages being paid to the allottee (25 U.S.C. § 357).

[fol. 8546]

The Tuscarora reservation has been allotted pursuant to Indian custom and state statute. The force and effect of the State Law is parallel in every respect to the federal statute. (25 N. Y. Consol. Laws, § 95.) This provision was first enacted in 1854 with specific reference to the Tuscaroras; it codified tribal allotment customs followed prior to that time. Lands so allotted, just as lands allotted pursuant to the federal statute on "federally" created reservations, lose their status as "tribal" or "common" lands:

> "The expression 'tribal lands,' as used in the act of 1854 and in sections 95 and 96 above, clearly and unmistakably refers to that portion of the reservation not already occupied by individual Indians and which may be referred to as the unallotted or common lands of the nation. This same expression 'tribal lands' occurs also in section 98 and must be given the same meaning that attaches to it where it appears in sections 95 and 96. Section 98 has not been quoted because of its length and for the reason that it appears to me to refer exclusively to the tribal or common lands of the nation and not to those lands which had been allotted or which were otherwise lawfully acquired by individual members of the tribe." *Tuscarora Nation of Indians* v. *Williams*, 79 Misc. 445, 447.

Even those individuals holding land under chain of equitable title tracing back to a pre-1854 tribal allotment are "owners" of the land as against the Nation which holds a merely nominal title:

> "True, the Indian Nation retains a nominal title to all the lands of the reservation; but for all practical purposes the individual Indian who acquired the land and cleared it before the act of 1854 and who through his heirs has held undisputed and

allotted to a man who acted as treasurer of the tribe. He surrendered it back to make up for some tribal funds which he had embezzled.[1] Of the 1,383 acres which the Commission licensed for the Niagara Project, only 45 acres of swamp land (in a corner of the proposed reservoir) is unallotted tribal land.[2] Allotted land is treated as the individual property of the allottee just like property owned in fee simple outside the reservation is treated by its owners. The Nation is in the same position, for instance, as the State of New York in that it can get possession of the [fol. 8545] property only in the case of escheat for lack of heirs. The allottees buy and sell the property, and upon death it is transferred by will or by intestacy.[3] Disputes over ownership are settled pursuant to State law in the State courts.[4] In addition to buying and selling the property, the allottees rent it legally to members of the tribe and illegally to non-Indians.[5] Allottees retain ownership of allotted land even though they have moved permanently from the reservation.[6] From the beginning, control of the

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uninterrupted possession ever since is the owner . . ." (id. at 451)

"Referring to the act of 1854, which in substance is the same as the sections above quoted, it will be observed that it recognized the fact that portions of the reservation had already come under cultivation and were in the possession of certain in- [fol. 8547] dividual Indians and by implication it exempts such lands from further allotment" (id. at 447).

No part of the Tuscarora reservation is "tribal land" within the meaning of that phrase as used in connection with Federally created reservations in Western United States: R. 5252.

[1] Exhibit 235, p. 3, R. 5187.

[2] R. 5295-5296.

[3] R. 4080-4081, 4089, 4100, 4143, 5381-5384, 5391-5392.

[4] R. 4101, 4129. *Peters* v. *Tallchief*, 121 App. Div. 309; *Matter of Printup*, 121 App. Div. 322; *Tuscarora Nation* v. *Williams*, 79 Misc. 445; *Mt. Pleasant* v. *Gansworth*, 150 Misc. 584 aff'd 242 App. Div. 675; *Mt. Pleasant* v. *Patterson*, 276 App. Div. 819.

[5] Exhibit 168, R. 4091, 4135-4137, 4673, 5413.

[6] R. 4690.

property has been pursuant to State law, and the Federal Government has never enacted any statute controlling the land in this reservation except the general statute, now Section 177 of Title 25 of the U.S. Code, forbidding non-Indians to purchase Indian tribal lands.[*] Allottees have

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[*] Every Constitution of New York State since the first in 1777 has forbidden trafficking in Indian Land without the consent of the Legislature (N.Y. Constitution of 1777, Art. XXXVII; N.Y. Constitution of 1938, Art. I, § 13). See also N. Y. Indian Law § 8 which deals with intrusions on Indian lands, § 9 which governs the residence of other Indians on tribal lands, § 10 which authorizes the licensing of non-Indians to reside on Indian lands, and § 11a which provides for recovering possession of reservation land unlawfully occupied by others.

The United States Commissioners of Indian Affairs have on many occasions asserted that they had no jurisdiction over the lands of the Tuscaroras (R. 5212, 5226). For 150 years the State of New York has exercised that jurisdiction to a large extent (R. 5273). The United States has never attempted to stop non-Indians from using the lands within the Tuscarora Reservation (R. 5212, 5253-5256). However, it did on three occasions state that the United States could not consent to the lease of a stone quarry without statutory authorization (R. 5222-5223, 5323-5328; Exhs. 238, 250, 251).

fol. 8548

There is no evidence that the Federal Government has approved any of the conveyances, leases, rights of way and easements as to land granted by the Tuscarora to others (R. 5202-5205, 5285).

Title 25 Chapter 8 which deals with rights of way through Indian lands and Chapter 12 which governs the lease, sale or surrender of "allotted or unallotted lands" have never been held to apply to Indian lands in New York State.

In a letter addressed to the Chairman of the Power Authority received October 7, 1957, the Department of Interior stated, in respect to the Tuscarora:

> "Although jurisdiction over these Indians has passed from the Federal Government to the State of New York, this Bureau, as well as the Department, is interested in their economic welfare" (R. 52).

In a letter dated February 24, 1941, addressed by the Department of Interior to its local Indian agent, that Department stated that it is without authority to interfere in the internal affairs of the Indians within the Tuscarora reservation (R. 5275-5276).

In a letter addressed to one of the Chiefs of the Tuscarora Nation on November 1, 1957, the Department of Interior declared:

> "... all Indians born in the United States have been made citizens of the United States and of the state where they reside

built houses and other dwellings on the allotted land and the Nation has absolutely no interest in them and receives no income from them. They are owned and controlled by the allottees just like buildings on non-reservation property.[24]

All citizens are entitled to the use and enjoyment of their privately owned lands and normally they cannot be required to sell their lands unless the lands are needed for some public purpose. In that event, however, the lands are subject to condemnation for the public purpose and the owners paid their fair market value.

"This is an obligation that attaches to all citizens and persons who enjoy the benefit of our form of government" (R. 5484-5485, Exh. 212).

In 1949 the Department of Interior closed its New York Indian Agency (R. 5356).

[fol. 8549]

In March 1958, the Nation made an agreement with Niagara Mohawk Power Corporation giving it an easement for a transmission line across the reservation. Separate agreements were made by the corporation with the individual Indians upon whose allotted land the transmission poles were located. The agreements were not submitted to the Secretary of the Interior or anyone in the Federal government (R. 4113-4114, 4221-4224, 4242, 4244-4246, 4256-4257, 5284). Prior thereto, the Nation had made another transmission line right of way agreement with the corporation (R. 4119). In addition, the Tuscarora have conveyed easements to railroad companies for railroad tracks crossing the reservation and to the telephone company for telephone lines, all without federal authorization (R. 4119-4123).

The Chiefs on behalf of the Tuscarora Nation, on September 15, 1835, conveyed to the Lockport and Niagara Falls Railroad Company a strip of land three rods in width forever for the purpose of constructing a railroad in consideration of payment of $35.00 per acre and a fair and reasonable price for all timber taken from the land for the construction of the road (Exh. 237, R. 5202-5205). There is no evidence of any Federal approval of that conveyance (R. 5254).

[24] R. 5390, 5394-5396, 5398, 5402-5404, 5413, 5414-5415.

When New York State has exercised its power of eminent domain in respect of Indian land it has honored the Indian title of individual allottees by awarding them just compensation for their condemned interests as well as honoring whatever title remained in the tribe. Awards for the interests of individual allottees have exceeded the award to the tribe. See *Dixon* v. *State*, 4 Misc. 2d 76

[fol. 8550] XI.

The number of Tuscarora living on the reservation has increased but little since it was established and it is very unlikely that it will increase substantially within the foreseeable future: in 1801 the reservation contained about 300 Tuscarora;[24] in 1886, 415;[25] and today 397 live there.[26] 168 other Tuscarora are enrolled in the tribe but live off the reservation.[27] Only about 43% of the population of the reservation consists of Tuscarora Indians. Approximately 288 Indians who are not Tuscarora also live on the reservation[28] and at least 221 non-Indians,[29] not counting the inhabitants of 180 trailers,[30] live there also.

[fol. 8551] XII.

There are approximately 180 houses on the reservation, including houses occupied by non-Indians.[31] There are also 180 trailers, only one of which is occupied by an Indian.[32]

(1956). The land needed for all public improvements on or across Indian reservation lands in New York State has had to be acquired pursuant to State law because no Federal law applies. See note 23 *supra*.

[24] Exh. 232-F.

[25] Exh. 235, p. 554.

[26] Exh. 210.

[27] Exh. 210.

[28] R. 4693. Only 68 of these non-Tuscarora Indians are listed in the enrollment book (Exh. 210), which lists all Indians entitled to share in the Tuscarora "Calico Annuity" whether members of the tribe or not (R. 4688).

[29] R. 4645. From 1950 to April 1, 1957 the number of non-Indians living on the reservation increased from 30 to 221 (R. 4669).

[30] There are 15 trailer camps having from 2 to 81 trailers—a total of 180 trailers (R. 4551-4556; Exh. 205). Before the Niagara Project began (February 1, 1958) there was only one trailer camp (R. 4302). Only one trailer is said to be occupied by an Indian (R. 4678-4679).

[31] Exh. 204; R. 4549.

[32] Exh. 205; R. 4551-4556, 4678-4679.

[fol. 8552]

XIII.

There are 37 houses within the area licensed for the Project of which one is unoccupied.[39] At least 12 are substandard shacks,[40] in several of which small children live. The total number of people living in the area is about 125.[41]

[fol. 8553]

XIV.

Without the 1,383 acres licensed for the Niagara Project, the reservation will consist of 4,866 acres.[42] If equally allotted, this would provide each member of the Nation who lives on the reservation 12 acres.[43] The licensee offered to pay $1,100 an acre for the land, in addition to paying for the buildings on the land, and improving the reservation for the benefit of its inhabitants by building of a $250,000 community center, constructing roads, draining and reclaiming swamp land and furnishing of utilities.[44] It offered to move all houses that are worth moving, and to substitute for those which are not worth moving other houses which it now has available for this purpose outside the reservation.[45] The new house locations could be on the remaining part of the reservation or on land which the Secretary of Interior could purchase at the request of the Tuscarora with funds paid by the licensee. This land so purchased would become part of the reservation.[46]

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[39] Exhs. 189, 203, 211; R. 4169, 5403.

[40] R. 4170. See Exh. 203; photographs numbered 2407, 2409, 2641, 4103, 4104, 4105, 4114, 4116, 4117, 4118, 4119, 4120, 4124.

[41] R. 5385, 5402, 5404-5405, 5412.

[42] R. 4247, 4676.

[43] Exh. 161.

[44] The number of enrolled Tuscarora living on the reservation is 397 (Exh. 210).

[45] Exhs. 181, 182, 198; R. 4230-4237, 4242-4243, 4270-4271, 4322-4328, 4331-4340, 4347-4348, 4499-4501; 4505-4506, 4510-4513, 4525-4535.

[46] R. 4356, 4391. The aggregate value of offers made by the Authority is $2,400,000 (R. 4530).

[47] 25 U.S.C. § 465.

[fol. 8554] XV.

Public welfare assistance is provided to the Tuscarora completely at State expense.[43] The education of the children is also provided completely at State expense.[44] The State furnishes medical service to the members of the Nation, also completely at State expense.[45] Neither the Federal Government nor the local municipalities have ever borne these burdens.[46] 13% of the Indian inhabitants of the reservation have received welfare assistance as compared with 3% of the general population of the State.[47] The incidence of tuberculosis, pneumonia and infant mortality is higher among the Tuscarora than among the State's population generally.[48] The rates of truancy among school children and of absence due to illness are higher than the State's average.[49]

[fol. 8555] XVI.

11 of the 36 families within the area of the reservation needed for the reservoir have received public welfare assistance at one time or another since 1950.[50] In addition, 7 other families who live outside that area but who own property within it have similarly received welfare assistance at one time or another during that period.[51]

[fol. 8556] XVII.

The amount of land within the reservation used for agriculture and the percentage of its inhabitants earning

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[43] R. 4601-4603.

[44] R. 4636-4637, 4639.

[45] R. 4564-4565, 4572, 4583, 4584.

[46] R. 4597-4598, 4628.

[47] During the past year an average of 88 Tuscarora received some form of welfare assistance (R. 4603-4604). The total number of Indians residing on the reservation at the present time is about 685.

[48] R. 4588-4589.

[49] R. 4636.

[50] R. 4843; Exh. 211.

[51] R. 4845.

their living through agriculture has steadily decreased since the reservation was established.[52] A similar decrease has occurred throughout New York State, but the decrease on the reservation has been more radical than elsewhere.[53] In 1888 84% of the reservation was used for farming whereas only 17% was tilled in 1958.[54] Much of the balance has long been abandoned for farming purposes.[55] While a considerable portion of the reservation is covered by wood-

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[52]

	Cropland (Acres)	
1888	3500	Exhibit 235, p. 3
1954	607	Exhibit 207, p. 8
[fol. 8557]	Land in Farms (Acres)	
1845	2079½	Exhibit 233, p. 502*
1855	3092	"
1888	5250	" 235, p. 3**
1930	4001	" 207, p. 9
1945	3883	" " "
1954	2866	" " "

* "improved land"

** "under cultivation" plus "pastureland"

	Number of Farms	
1930	59	Exhibit 207, p. 8
1945	99	" " "
1954	27	" " "

See also Finding XX, *infra*.

[53] Between 1930 and 1954 land in farms decreased:

15% in New York State (Exh. 207, Cover Page)
13% in Niagara County (Exh. 207, p. 9)
19% in the Town of Lewiston (Exh. 207, p. 9)
28% on the Tuscarora Reservation (Exh. 207, p. 9).

During the same period farm production in New York State *increased* 25%, while production of every crop for which change is shown *decreased* on the Tuscarora Reservation (Exh. 207; note 57, *infra*).

[54] Exh. 235, p. 3; Exh. 227.

[55] 853 acres have been allowed to return to scrub (Exh. 227). Wooded and swamp area has increased from 1,000 acres in 1888 (Exh. 235, p. 3) to about 1,500 acres (Exh. 227). In addition to the foregoing 1,485 acres of farm land were not farmed in 1958 (Exh. 227).

land it contains no commercial timber. What wood there is is only good for fuel, and its value for that purpose is minimal—about $10.00 to $20.00 an acre.[56] The number of cows and other animals and the production of milk, grain, fruit and other products have steadily decreased and are continuing to decrease.[57]

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[56] Exh. 227, R. 4144-4153.

[57] [fol. 8558]

Farms With Poultry

1945	59	Exhibit 207, p. 11
1954	13	" " "

Number of Chickens

1945	3184	Exhibit 207, p. 11
1954	485	" " "

Farms with Fruit Trees

1888	"Many fine orchards"	Exhibit 235, p. 3
1944	40	" 207, p. 18
1954	15	" " "

Acres in Fruit

1944	259	Exhibit 207, p. 18
1954	135	" " "

Bushels of Apples Produced

1855	636	Exhibit 233, p. 502
1954	60	" 207, p. 18

Acreage of Grain

	Wheat	*Oats*	*Corn*	
1845	405½	205½	152	Exhibit 233, p. 502
1855	745	193	228½	" " "
1954	174	133	85	" 207, p. 13

Farms With Milk Cows

1945	16	Exhibit 207, p. 10
1954	6	" " "

Number of Milk Cows

1845	98	Exhibit 233, p. 502
1855	112	" " "
1945	55	" 207, p. 10
1954	26	" " "

[fol. 8559] XVIII.

There are about 500 acres of swamp land on the reservation outside the reservoir area which have never been used for farming and which can be drained and reclaimed for that purpose."

[fol. 8560] XIX.

Much of the reservation land now devoted to agricultur is being farmed by non-Indians—who do not live on the reservation—under illegal leases from the members."

[fol. 8561] XX.

The bulk of the inhabitants of the reservation who work for a living do so off the reservation." The number work-

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" R. 4007-4008, 4016-4017, 4541-4542.

" About 640 acres are leased to 7 non-Indian farmers who live off the reservation (Exhs. 168, 227; R. 4405-4406, 4424, 4436, 4446, 4453-B, 4456, 4787, 4791). In several cases written leases to non-Indians have been signed by members of the Nation (Exhs. 175, 176, 177, 178; R. 4405, 4455). The Nation itself rents land to non-Indians (R. 4407) and was doing so in 1888 (Exh. 235, p. 3).

" Male Population, Enrolled Indians Living on Tuscarora Reservation, Age and Employment (based on data contained in Exhibit 210 prepared by three Tuscarora Chiefs as current (1958) facts).

Age	*Work on Reservation*	*% of Those Working*	*Work off Reservation*	*% of Those Working*	*Employment Not Stated or "Retired"*
0-8	none	—	none	—	(42)
9-18	none	—	none	—	(55)
19-28	1	6¼%	15	93¾%	12
29-38	none	0	29	100%	1
39-48	none	0	23	100%	3
49-58	1	9%	11	81%	none
59-68	2	16⅔%	10	83⅓%	1
69-	1	50%	1	50%	10
Total	5	5.3%	89	94.7%	27 (over 18)

The average age of men now working on the reservation is 58; of those who work off, 41 (Exh. 210). 6 women work on the reservation and 12 work off the reservation (Exh. 210).

ing off the reservation is steadily increasing and the number who earn their living by farming is steadily decreasing.[51]

[fol. 8562] In the area needed for the reservoir there is only one full-time farming operation.[52] This is conducted by an Indian chief who has six sons, five of whom work off the reservation and one of whom is presently engaged in working full-time with his father.[53] The Chief farms 630 acres, of which he owns 170. He leases the balance from other members of the Nation.[54] The members from whom he leases land work off the reservation.[55] The area he farms is roughly equivalent to the amount of land outside the reservoir area farmed by non-Indians under illegal leases.[56]

[fol. 8563] XXII.

The amount of reservation land remaining after the building of the reservoir will be more than adequate to provide, both now and in the foreseeable future, decent housing for the members of the Nation and for other Indians whom they allow to live with them. The people who live in substandard dwellings on the part needed for the reservoir will be far better off if their property is taken and they are provided with adequate housing on the balance of the reservation or on other land acquired to become part of the reservation for that purpose. Their health and welfare and that of their children will be im-

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[51] In 1855 agriculture was the "sole dependence" of the Tuscarora (Exh. 233, p. 512).

In 1950 there were 25 men and 3 women employed in agriculture or related pursuits; there were 80 men and 27 women otherwise employed in occupations which in the case of the men were obviously off the reservation (Exh. 209, R. 4655).

[52] In 1855 agriculture was the "sole dependence" of the Tuscarora

[53] R. 4204-4205.

[54] R. 4191-4194.

[55] R. 4673-4675.

[56] Non-resident non-Indians lease about 640 acres of the reservation (Exhs. 168, 227).

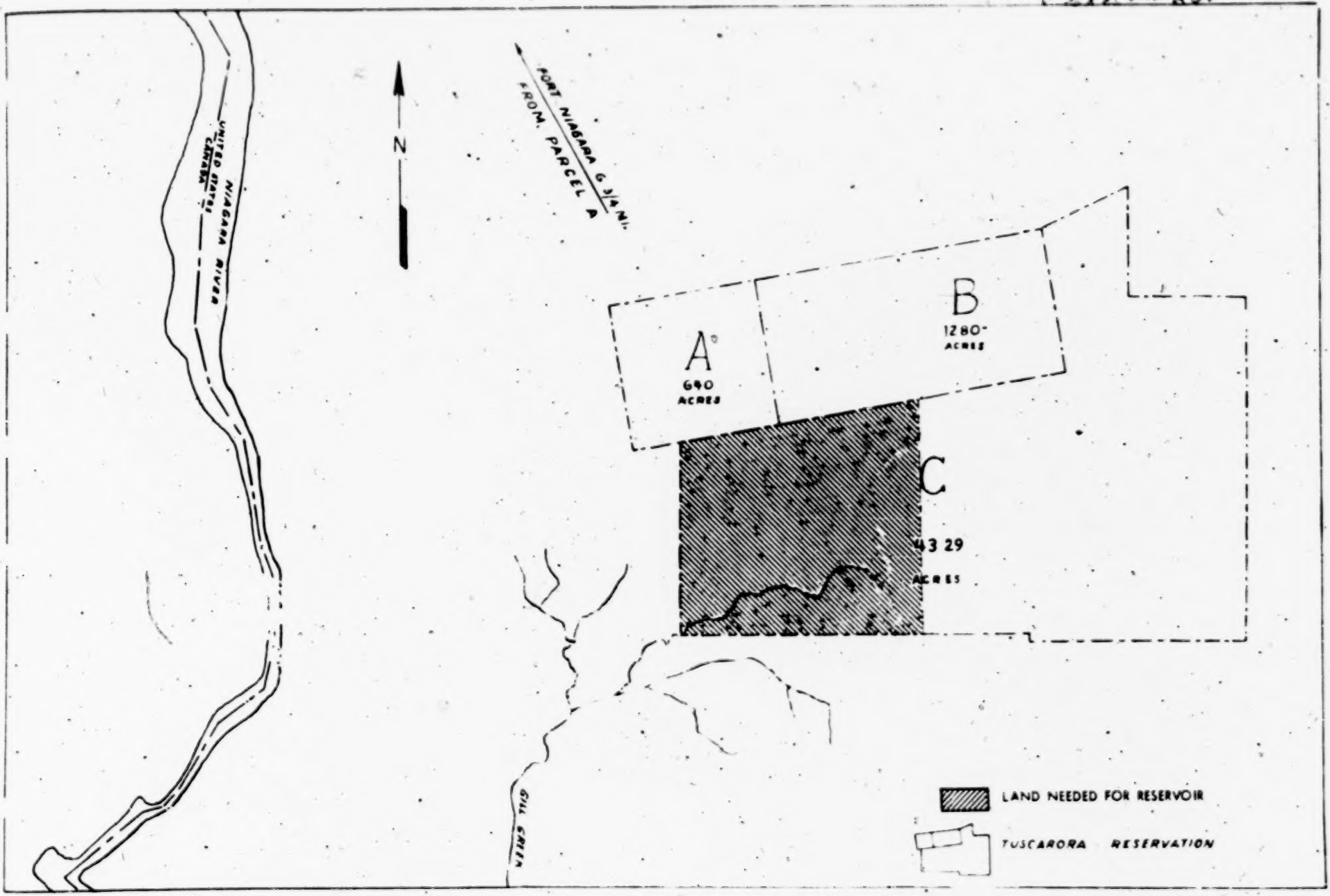
proved. The inhabitants of those houses on the land needed for the reservoir which are adequate, can be better housed elsewhere by moving their existing houses or providing them with other houses because at the new locations water, sanitary facilities and utilities will be provided, as offered by the licensee. Thus, to the extent that the purpose for which the reservation was created or acquired was the providing of housing for its members, taking part of the land will not adversely interfere or be inconsistent with it. On the contrary, such taking will promote that purpose.

[fol. 8564] XXIII.

The land to be left in the reservation after the building of the reservoir will be more than adequate to provide a place to farm for those members of the Nation and other Indians living with them who are willing to do so, including both full-time farmers and those who carry out garden operations. This is true for the present and for the foreseeable future. Arrangements can be made to transfer the farm operations of the one full-time farmer on the land to be taken to other parts of the reservation, such as the area which is illegally farmed by white farmers. Reclamation work on the remaining part of the reservation which the licensee has offered to do, together with other work of improving the soil which can be brought about through the use of the compensation to be paid by the licensee, can make the remaining part of the reservation a far more productive and a far better site for agricultural activities than the whole reservation is now. Thus, to the extent that the purpose for which the reservation was created or acquired was to provide an opportunity for the members of the Nation to carry on farming, or to subsist by farming, taking part of the reservation will not adversely interfere or be inconsistent with such purpose.

[fol. 8565] XXIV.

The licensing of 1,383 acres of intervenor's reservation will not interfere or be inconsistent with the purposes for which the reservation was created or acquired.


N
FORT NIAGARA 6 3/4 MI.
FROM PARCEL A
NIAGARA RIVER
UNITED STATES
CANADA
A
640
ACRES
B
1280
ACRES
C
43 29
ACRES
GILL CREEK
LAND NEEDED FOR RESERVOIR
TUSCARORA RESERVATION

[fol. 8566]

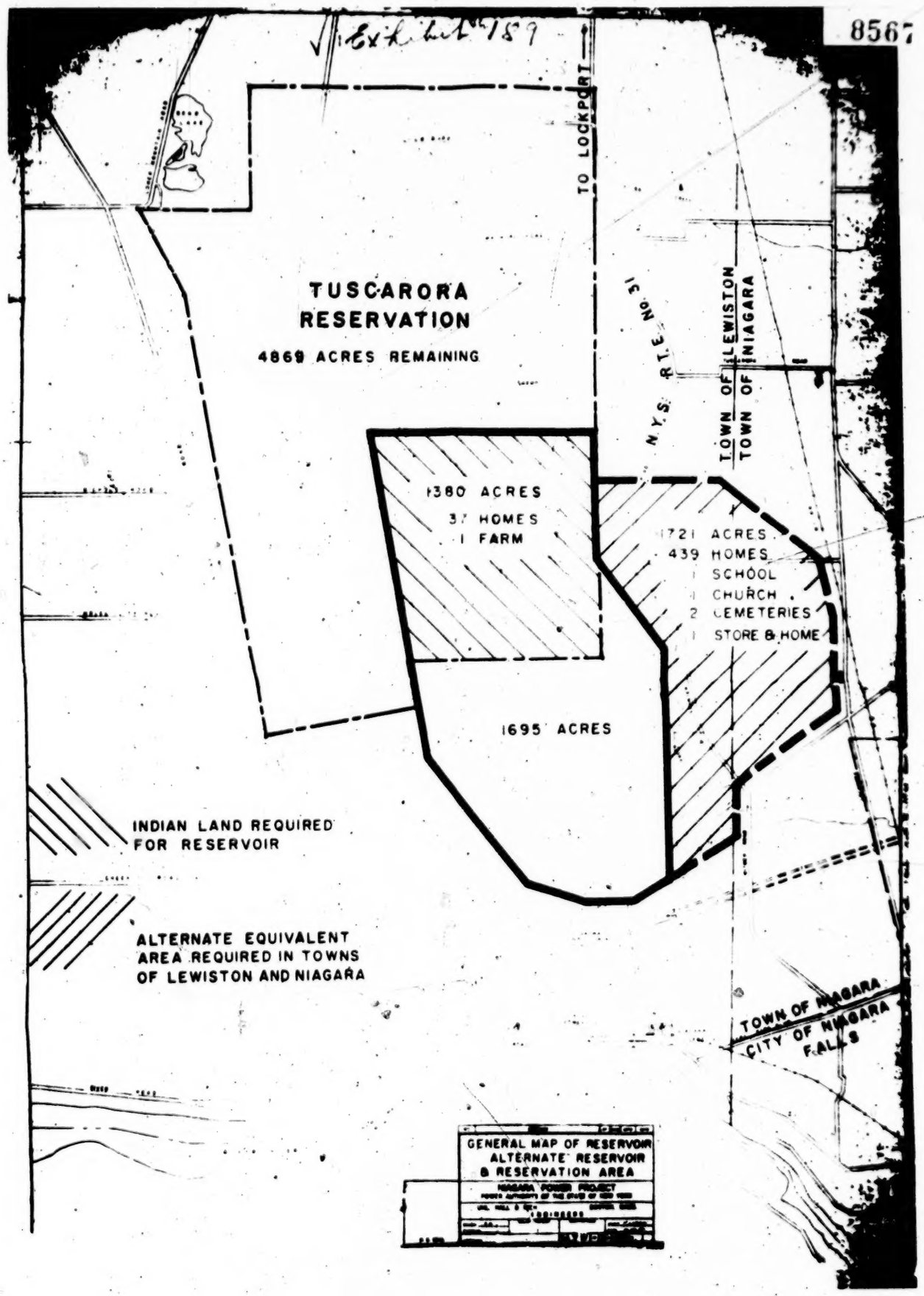
EXHIBIT 231

[fol. 8567]

EXHIBIT 189

(See Opposite)

Exhibit 189


TO LOCKPORT
TUSCARORA
RESERVATION
4869 ACRES REMAINING
N.Y.S. RTE. No. 31
TOWN OF LEWISTON
TOWN OF NIAGARA
1380 ACRES
37 HOMES
1 FARM
1721 ACRES
439 HOMES
1 SCHOOL
1 CHURCH
2 CEMETERIES
1 STORE & HOME
1695 ACRES
INDIAN LAND REQUIRED
FOR RESERVOIR
ALTERNATE EQUIVALENT
AREA REQUIRED IN TOWNS
OF LEWISTON AND NIAGARA
TOWN OF NIAGARA
CITY OF NIAGARA
FALLS
GENERAL MAP OF RESERVOIR
ALTERNATE RESERVOIR
& RESERVATION AREA
NIAGARA POWER PROJECT

[fol. 8568] Certificate of Service (omitted in printing).

[fol. 8573]

BEFORE FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey.

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317

OPINION AND FINDING—Issued February 2, 1959

We have given further consideration to the license order issued on January 30, 1958 (19 FPC 186) to the Power Authority of the State of New York for the Niagara Falls Project No. 2216 under the Federal Power Act and Public Law 85-159 approved August 21, 1957 (71 Stat. 401) and to the order of March 21, 1958 (19 FPC 362) denying rehearing.

On November 14, 1958, the United States Court of Appeals for the District of Columbia Circuit, in *Tuscarora Indian Nation* v. *F.P.C.* (No. 14475) in a memorandum opinion, remanded the order of January 30, 1958 to the Commission for consideration of a possible finding under Section 4(e) of the Federal Power Act that the license for the Niagara Falls Project will not interfere or be inconsistent with the purpose for which the Tuscarora Indian reservation was acquired. The court allowed fifteen days within which we were to report. This time has been extended by the court, upon our request, so that we might hold hearings and consider the new evidence presented. The hearing commenced on November 24, 1958. The parties concurred in omission of the intermediate decision procedure. Proposed findings and conclusions were filed by

the parties on December 19, 1958, and we heard oral argument on January 2, 1959.

At the conclusion of the hearings, the Tuscarora Indian Nation and the Power Authority entered into negotiations seeking a settlement of their differences. Although these negotiations were carried on in good faith by both parties they were not successful, and we accordingly are immediately acting, upon being advised by them that further negotiations were impractical.

Since the opinion of the court is not final, we believe it is desirable also briefly to discuss and make findings with respect to other evidence admitted by the examiner.

[fol. 8574] In our order of January 30, 1958 issuing license after the conclusion of the first hearing, we found that it would be infeasible to reduce the area of the proposed storage by about 720 acres as proposed by the Town of Lewiston and that a pumped-storage reservoir with a usable storage capacity of 60,000 acre-feet and utilizing about 25 feet of drawdown would be required to properly utilize the water resources involved. Although maps and drawings presented at the first hearing showed that it would be physically possible to relocate the pumped-storage reservoir so as to eliminate the Indian lands, and the New York Power Authority so contended, the location of Indian lands and their topography made them the best suited of any lands that might be available for reservoir purposes for the Niagara project.

The record shows, and we now find, that the use of other lands in lieu of Indian lands for pumped-storage reservoir purposes would cause a substantial delay in construction; would result in severe community disruption; would separate parts of the Town of Lewiston by a large body of water which could not be bridged; would call for the rerouting at unreasonable expense of main highway and railroad tracks, and disrupt school transportation, sewage, domestic water supply, fire protection and civil defense activities; would require the removal of approximately 450 homes and two cemeteries and call for the destruction of a new school costing over a million dollars.

We also find from the whole record that a pumped-storage reservoir with usable storage capacity of 60,000

acre-feet is required to utilize all of the United States' share of the water of the Niagara River made available by international agreement, a requirement expressly imposed by Congress in the Act of August 21, 1957, Public Law 85-159. A pumped-storage reservoir of smaller area with usable storage capacity of 60,000 acre-feet utilizing higher dikes and a drawdown of more than about 25 feet is technically infeasible and is economically undesirable. The removal of the pumped-storage reservoir from Indian lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet resulting in a loss of about 300,000 kilowatts of dependable or a reduction of about one-sixth of the total dependable capacity of the Niagara Project.

Since the Court of Appeals for the District of Columbia has found our conclusion that there was no necessity for a finding under Section 4(e) to be erroneous, we now proceed to the task assigned us by the court.

[fol. 8575] We find that the Tuscarora Indian Nation comprises 6,249 acres of land and is situated in the County of Niagara in the State of New York and that the Tuscarora Nation of Indians has continuously resided on the reservation for more than 150 years. The Power Authority of the State of New York seeks to acquire 1,383 acres of land within the reservation for use as a reservoir site. This land and other land contiguous to it were acquired by the Tuscarora for a homeland and a place to live and for farming and related uses. The Tuscarora had left North Carolina and gone to this land in the State of New York.

There are more than 600 Indians presently residing on the reservation and there are 37 homes which are occupied by more than 175 persons within the proposed reservoir site. The construction of the proposed reservoir would inundate or make unusable approximately 22 per cent of the entire Tuscarora reservation. In our opinion the fact that the Indians who would be displaced could find room on other parts of the reservation is immaterial because it is entirely possible that the number of Tuscarora desiring to use reservation lands will increase in the future.

The possibility that the displaced Tuscarora could relocate on other lands now not a part of, but contiguous to the reservation is immaterial. Such an arrangement would seem to provide an equitable solution to the problem, but would not alter the fact that the taking of the 1,383 acres of Tuscarora lands would interfere and would be inconsistent with the purpose for which the reservation was created or acquired.

We, therefore, find that the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired.

We realize that this finding will result in a higher cost for the electricity to be generated by this project, and that in the event it is not economically feasible to substitute other lands as a reservoir site, will result in a plan not best adapted to the comprehensive development of the Niagara River for power and other purposes. Accordingly, we regret that we have not been able to reach any other solution. However, we cannot permit our judgment to be swayed by our personal views of what is desirable but must administer the laws as passed by the Congress and as interpreted by the courts. No other finding may be reached by us under the evidence.

Since this is a final order insofar as this Commission is concerned, the parties have a right to petition for rehearing under the provisions of Section 313(b) of the Federal Power Act in the event they disagree with our conclusions [fol. 8576] and wish to appeal therefrom, and for this reason we are at this time certifying to the court only a copy of this opinion and finding and are retaining the record made at the hearings.

By the Commission. Commissioners Stueck and Connole dissenting.

/s/ J. H. Gutride
Joseph H. Gutride,
Secretary.

[Emblem]

Federal Power Commission

[fol. 8577] CONNOLE and STUECK, Commissioners, dissenting:

We have been asked by the United States Court of Appeals for the District of Columbia to explore the possibility of making a finding that the storage reservoir of the Niagara River Power Project can be constructed on the tribal lands embraced with the Tuscarora Reservation without interfering or being inconsistent with the purpose for which that Reservation was created or acquired. Majority have completed their exploration and return to the Bench with empty hands. The expedition into the legal jungle has been fruitless.

As a result a seven hundred million dollar project,[1] financed by lending institutions, insurance companies and the savings of private citizens, through bond issues, hangs as near the edge of disaster today as did the ill-fated Shoellkopf plant on June 7, 1956 just before it crashed to destruction in the Niagara Gorge. That disaster gave such urgency to this project that every partisan and selfish interest but one was forgotten in the pressing need for power. Yet, because one interest persists, "the largest hydroelectric project in the United States" as the Second Circuit described it,[2] may never be built for want of a finding, the need for which should never have arisen in the first place.

And the pity is, the finding not only can and in common sense should be made, it is legally compelling that such a finding be made. The business of this separate statement is to show why and how, in barest outline, that is so.

[fol. 8578] It is unimportant whether we agree with the conclusion that the proviso in Section 4 (e) requires a Commission finding with respect to the lands in question here. What is important is the conclusion by the United States Court of Appeals for the District of Columbia: "We do find that, in allowing the Commission under Section 4 (e)

[1] Including interest charged construction, land rights and reimbursement to Federal Government and to municipalities.

[2] *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, CA 2, Docket No. 25236, July 24, 1958.

of the Federal Power Act to deal with 'public lands and reservations' as defined in Section 3 (2). Congress was exercising, not only its power under the property clause of the Constitution but also its power to regulate commerce with the Indian tribes and, therefore, *to allow alienation of the land here involved*," (our emphasis.)

The controlling importance of this conclusion rests in its concession that alienation of part of a reservation subject to Section 4 (e) of the Federal Power Act, is not, *per se*, and as a matter of law, inconsistent with the purposes for which the reservation has been created.

Majority's position fails, we think, for two reasons. First, it confuses the means to achieving the end for which the reservation was created with the end itself. Second, it too narrowly construes the purpose for which the reservation was created.

The purpose for which this and any other Indian reservation is created is to assure a peaceful, reasonably comfortable and secure life for the tribes. In that fashion they are compensated for the means of maintaining a livelihood of which they had been deprived elsewhere. The ownership, occupancy and use of land is a means to that end. Particularly in the agrarian society prevailing in early 19th century America, land was a *sine qua non* to achieving that end.

Ownership of land was not an end in itself, however. In that respect, the physical thing comprising the reservation served the same purpose as the more metaphysical things such as exemption from certain state laws, and wardship status under the guardianship of the Secretary of the Interior. The reservations were not created to make land companies out of Indian tribes. Ownership, occupancy and use of land never should be elevated to a status more important that the end or purpose for which that ownership was [fol. 8579] designed. If called upon to measure whether the end for which a reservation has been created will be furthered or frustrated by a proposed activity, then, we must not ask ourselves simply whether that activity will deprive

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Tuscarora Indian Nation v. F. P. C., CADC No. 14475, decided November 14, 1958, slip sheet opin. p. 11

the Indians of land. Rather we must inquire whether the proposed activity will interfere or be inconsistent with the assurance to the Indians of a peaceful, reasonably comfortable and secure life. Continued ownership, occupancy and use of the land given to or acquired by the Indians may or may not carry with it such an assurance. Indeed it is not difficult to imagine conditions under which continued ownership, occupancy and use of lands originally used by the Indians as a means to such end might be the worst thing for them. For example, if the location were endangered by radioactive fallout from nuclear explosion.

Certainly, we think, if the physical occupation of part of the land, the covering of it with some 65 feet of water, is all that we are to consider we are never to answer this problem. The District of Columbia Circuit knew that these lands would be physically occupied. Yet it asked us to determine whether their physical occupation was within our province to condone. It knew the lands might be alienated. Yet it asked us to rule whether that alienation was proper. Manifestly, if occupation and alienation, *per se*, were inconsistent as a matter of law, there would be nothing on which we could rule. The fact that we are making this determination at all is total proof that there is more to be answered than these simple questions whether the land of the Tuscarora will be occupied or alienated.

If possible alienation of the lands does not *ipso facto* require a finding of inconsistency or interference, *a fortiori*, the presence of positive showing that to alienate the land will further that purpose of the reservation will argue strongly for it, all other factors under the Act being favorable, as they are here.

We must discard the simple fact of potential alienation as evidence of inconsistence or interference. Something more must appear. We search the record in vain for any. In fact, the record contains only assertions by counsel and others that it would be patently inconsistent for the reservoir and the Indians to occupy the land at the same time. There is plainly misdirected emphasis on occupation of specific land as the basis of inconsistence. Then there is the contention that the *amount* of land taken, measured as a proportion of the total, governs.

[fol. 8580] We think a far more rational test is whether the alienation—whether of one-half of one per cent or ninety-nine per cent,—would be inconsistent or would interfere with the purpose of the reservation. On this point, the record made out by the Tuscarora is fatally deficient. There simply is no positive showing that alienation of these lands, if accompanied by and done pursuant to, appropriate conditions will be inconsistent or interfere with the reservation's purpose. Rather it appears that appropriate conditions are possible.

The language of the proviso in Section 4 (e) does not confine us to the issue whether the taking of land will be inconsistent or not. It directs us to determine whether the *license*, in its totality, will be inconsistent. The license contains much more than the authority to take land. The same proviso directs that the license, "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The record does show that if the alienation is through condemnation under Section 21, the appropriate Court will fix the compensation to be paid to the Indians. In addition, as the Second Circuit points out, the Secretary of the Interior or the Tuscarora may purchase substitute lands if sufficient funds are made available. Moreover, by the terms of the offers made by Power Authority, swamps would be drained, roads built, and other improvements made on the remaining lands.

It would be quite a simple thing to attach conditions to the license that would assure to the Tuscarora the continuation of the way of life which they have selected as their own. In fact, this proposed purchase of land brings to the Tuscarora an unprecedented opportunity to advance whatever way of life they had been following. Never before has such a chance come their way. And probably, never will it come again.

If it is land that they want, then land they can get. And better land, drained, improved and laced with roads. In fact we are told that options on virtually identical amounts of land have actually been obtained. We filed our motion

for additional time in this cause on January 16 because of the pendency of negotiations respecting the acquisition of reservation lands. As all parties were aware, including, ourselves, these negotiations were based, among other things, on the availability of substitute lands for use of the Tuscarora.

[fol. 8581] If it is improved farming facilities, homes, schools, health facilities they want, these are obtainable. Or if it is merely the security of knowing that an asset, in the form of land, is held in their tribal name, this too can be had.

These or many similar advantages, as may be suggested by the Secretary of the Interior and the Tribe itself, may easily be inserted in this license as reasonable conditions to the permission to occupy these reserved lands. Certainly any lawful action that offers to the Tuscarora a chance to advance its tribal well-being and more fully to provide for those members of the Tribe who are yet unborn can hardly be said to be inconsistent or to interfere with the end for which the reservation was created. As we have seen and as Counsel for the Tribe has conceded, this purpose is to enable the Indians to live peacefully and harmoniously.

As long as the means are at our disposal to advance the end for which the reservation was created we should take advantage of them. The conditioning power inherent in our licensing authority is ample to do so.

The next, inevitable and only remaining conclusion is that the license will not be inconsistent with or interfere with it.

We ought to say so to the District of Columbia Circuit, require the Power Authority to meet the terms we find necessary to further the purpose of the Tuscarora Nation, as Power Authority has offered, and permit them both to go about their businesses.

William R. Connole, Commissioner

Frederick Stueck, Commissioner

[fol. 8583]

BEFORE THE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

PETITION FOR REHEARING BY LICENSEE POWER AUTHORITY OF THE STATE OF NEW YORK—February 9, 1959

Without conceding that the Commission's

"Opinion No. 317
Opinion and Finding"

issued February 2, 1959 is a final order as stated therein, Power Authority of the State of New York, licensee of Project No. 2116, respectfully petitions pursuant to § 313 (a) of the Federal Power Act and § 1.34 of the Commission's Rules of Practice and Procedure (a) for rehearing with respect thereto, (b) for reversal, vacation and modification thereof, and (c) for the making of the findings formerly requested of the Commission by the licensee on December 19, 1958.

The grounds for this petition and the errors complained of are:

1. The Commission erred in that its finding that the license will interfere and be inconsistent with the purpose for which the Tuscarora reservation was created or acquired was based on an erroneous legal interpretation of the first proviso of § 4(e) of the Federal Power Act. Under [fol. 8584] that interpretation the proviso would have no meaning whatsoever, and it would be impossible as a matter of law for the Commission to license for reservoir purposes any land contained in a "reservation" within the meaning of the statute.

On December 1, 1958, the Tuscarora moved the Court of Appeals for the District of Columbia Circuit to enter judgment of immediate reversal, and to curtail the recent hearing before the Commission, upon the very ground now

adopted by the Commission, that as a matter of law it is impossible to license the use for reservoir purposes of a "substantial portion" of the Tuscarora Reservation. On December 11, 1958 the motion was in all respects denied.

Section 24 of the Act empowers a license to enter upon lands of the United States licensed by the Commission—including reservations of the United States—after paying or giving security to assure payment of damages to the owners of buildings, crops and other improvements. Thus the plain language of the Act shows that a project may be licensed to occupy and destroy betterments on part of a reservation, and that such a license does not *per se* interfere and is not necessarily inconsistent with the purposes for which such reservation was created or acquired.

2. The Commission erred by failing to consider the evidence adduced at the hearing and erred in failing to make, and in fact ignoring, the licensee's requested findings of facts bearing directly on the question of whether the licensing of Tuscarora land would interfere or be inconsistent with the purpose for which the reservation was established.

The majority opinion shows that its finding that the [fol. 8585] license will interfere with the purposes for which the Tuscarora reservation was established was not based on the evidence adduced after remand by the Court of Appeals, but was based entirely on facts known to the Court when it remanded this matter to the Commission, *viz.* that the Tuscarora Indian reservation contains 6,249 acres and has an Indian population of approximately 600 (of whom only 397 are Tuscarora), and that the licensee proposes to use 1,383 acres of it for the Niagara Power project.

The facts as proved at the hearing are relevant to the Commission's making a proper decision and it is necessary that the Commission make findings with respect to them in order that its decision can be reviewed on appeal. Among these facts are the following:

(i) If 1,383 acres of the Tuscarora reservation are used for the Niagara project enough land will remain to meet

the most remotely foreseeable needs of the Tuscarora (P. F.* XVII, XVIII, XIX, XX, XXI, XXII, XXIII).

(ii) If more land were needed it could be bought with money the licensee will pay and added to the reservation (P.F. XIV).

(iii) The Tuscarora use only a small part of the reservation for the residential and agrarian purposes for which it was created (P.F. XI, XII, XIII).

(iv) The Tuscarora's use of the reservation for agriculture has steadily declined for many years, use of the reservation by non-Indians has sharply increased, and there is no evidence that the Tuscarora will need more land in the future. In fact all indications are to the contrary. (P.F. XI, XII, XIX, XX, XXIII).

[fol. 8586] (v) The Tuscarora will be better off and the purposes for which the reservation was established will be carried out to a greater extent if part of their land is taken, the balance is improved and more adequate housing is provided with sewer and other facilities all as offered by the licensee, and, if desired, substitute land is purchased (P.F. XIII, XIV, XV, XVI, XXII).

3. The Commission erred by making a blanket finding that the license "insofar as it includes land of the Tuscarora Indian Nation will interfere and be inconsistent with the purpose for which such reservation was created or acquired". The very least, under any theory of law, that the Commission can possibly find with respect to whether the use of Indian land will interfere or be inconsistent with the purposes of the reservation is that the use of such land for the purposes of transmission lines will not interfere or be inconsistent. Of the entire area of 1383.55 acres of the Tuscarora reservation licensed for the Niagara Power project, 85.6 acres were licensed to provide the site for transmission lines which pursuant to an order of the United States District Court for the Western District of New York granting possession of the land have now been more

* "Findings and Conclusions Proposed by Applicant," December 19, 1958 are referred to herein as "P.F."

than 98% completed. There are a number of instances in which the Tuscarora have granted easements for railroads and transmission lines (P.F. X, Note 23). The latest one was in 1958 when they granted an easement for a transmission line to Niagara Mohawk Power Corp., for which the company paid $13,200 to allottees across whose land the line was built, and $3,000 to the tribe. (N.Y. Pub. Serv. Com. Doc. No. 18,879-1958) Counsel for the Tuscarora conceded, during the recent hearings before the Commission, that the use of reservation land for such purposes would not interfere or be inconsistent with the purpose for [fol. 8587] which the reservation was created or acquired. In his opening statement, Counsel for the Tuscarora said:

> "Water conduits, transmission lines, power houses and access roads are examples of project works which generally do not require a material amount of land, which cause negligible interference with the use of property and thus which readily can be found consistent with the purpose for which a reservation was established. Accordingly, the Commission may license such facilities on tribal lands embraced within an Indian reservation". (R. 3873-3874)

He made the same concession on oral argument (R. 5589).

4. The Commission erred in failing to state unequivocally whether or not Tuscarora land is necessary for the Niagara Project as requested in the licensee's Proposed Findings and Conclusions (P.F. III, IV). The majority opinion states:

> "We realize that this finding [with respect to Tuscarora land] will result in a higher cost for the electricity to be generated by this project, *and that in the event it is not economically feasible to substitute other lands as a reservoir site* will result in a plan not best adapted to a comprehensive development of the Niagara river for power and other purposes".

The Commission also found that any attempt to use alternate land in place of Tuscarora land would delay construction, cause severe community disruption, separate

the Town of Lewiston by a large body of water which could not be bridged, require rerouting at unreasonable expense of main highways and railroad tracks, disrupt schools, sewage, water supply, fire protection and civilian defense, and require the removal of approximately 450 homes and two cemeteries and the destruction of a new school costing more than $1,000,000.

[fol. 8588] The record shows without contradiction that the use of alternative land would delay completion of the project by at least 2½ years after the completion of all litigation which would be involved in the acquisition of such alternative land (R. 4508, 4866), and that delay in the project would cost the licensee more than $70,000 a day in interest charges alone and the power users on the Niagara frontier more than $100,000 a day (R. 4946, 4947). This alone would make the use of alternative land absolutely infeasible economically.

The community disruption which the majority has found would result from the use of alternative land is vastly greater than the community disruption which the Commission sought to avoid by requiring the licensee to substitute covered conduits for an open canal as part of the waterways (Exh. 202; R. 4341-4343, 4467-4468, 4484, 4488-4489, 4755, 4864). Such community disruption would in itself make a plan involving the use of alternative land incompatible with the comprehensive development of the Niagara for beneficial public use required by 10(a) of the Federal Power Act.

The Commission should make unequivocal findings that (1) the use of alternate land in place of Tuscarora land for the reservoir is not economically feasible; and (2) even if the use of alternate land were economically feasible its use would cause such great community disruption that the project would not meet the 10(a) condition that it be best adapted to a comprehensive plan for development of the Niagara river.

[fol. 8589] 5. The Commission erred in completely ignoring licensee's request for findings of facts, amply supported by the evidence, which are relevant to the question which the court which remanded the case to the Commission

still has before it (because it has not made a final order) having to do with the origin of the Tuscarora reservation (P.F. V, VI, VII), the purposes for which it was created or acquired (P.F. VIII), the interest in and ownership of the land therein and failure of the United States to own any interest in it (P.F. X), its supervision by the State of New York and its failure to fall under the supervision of any Department of the United States Government (P.F. XV, XVI), its failure to constitute tribal land embraced within an Indian reservation (P.F. X) and the legislative history of the 1957 Act which authorized the project (P.F. II).

6. The Commission's failure to state any finding or conclusion upon the matters with respect to which proposed findings were submitted is a clear violation of §8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b) and §1.30(g) of the Commission's Rules of Practice and Procedure.

7. The Commission erred in permitting the participation of a member who did not hear oral argument.

The majority of the Commission consisting of Chairman Jerome K. Kuykendall and Commissioners Arthur Kline and John B. Hussey stated:

> "We, therefore, find that the license issued herein insofar as it includes land of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired". (Opinion No. 317, p. 3)

[fol. 8590] Commissioners Frederick Stueck and William R. Connole dissented, solely with respect to that finding.

The Commission's finding has no validity because Commissioner Hussey, one of the Commissioners casting a decisive vote, was not present at the oral argument, and there was no stipulation permitting his participation in the Commission's decision. The Commission by formal order of December 12, 1958, directed that oral argument be held on January 2, 1959. In so doing, it found that "It is appropriate and in the public interest that the parties be given an opportunity to present oral argument before the Com-

mission respecting the issues in this proceeding". Pursuant to such order oral argument was had before four members of the Commission (R. 5523). No suggestion was made to the parties at the argument or at any other time that Commissioner Hussey, who did not hear the argument was to take any part in the decision.

The Commission's finding that the license will interfere or be inconsistent with the purpose of the Tuscarora Indian reservation is therefore without legal effect and should be vacated. *WIBC, Inc.* v. *Federal Communications Commission*, 259 F. 2d 941 (D.C. Cir. 1958).

* * *

The Power Authority requests a prompt decision on this petition because if the way has not been cleared to build a reservoir on Tuscarora land very shortly, it will be necessary for it to make an application to the Commission to amend the license by providing for a smaller reservoir, none of which will be located on Tuscarora land.

Work on the project cannot be stopped. The effect would be so disastrous that this needs no argument.

[fol. 8591] Wherefore, the petition for rehearing should be granted and upon such rehearing the Commission's Opinion and Finding of February 2, 1959, should be reversed or vacated and the findings proposed by the licensee on December 19, 1958 (to the extent that they have not been made) and those requested herein should be made.

Respectfully submitted,

Thomas F. Moore, Jr., General Counsel, Power Authority of the State of New York, 10 Columbus Circle, New York 19, New York.

Of Counsel: Samuel I. Rosenman, John R. Davison, Scott B. Lilly.

February 9, 1959

Duly sworn to by Thomas F. Moore, Jr., jurat omitted in printing.

[fol. 8592] Certificate of Service (omitted in printing).

[fol. 8596]

BEFORE THE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

SUPPLEMENT TO PETITION FOR REHEARING BY LICENSEE POWER AUTHORITY OF THE STATE OF NEW YORK —February 11, 1959

This is a supplement to the Petition for Rehearing filed by the licensee on February 9, 1959 with respect to the Commission's

"Opinion No. 317
Opinion and Finding"

issued February 2, 1959 which the Commission stated to be a final order. Its purpose is to ask the Commission to make certain findings warranted by the evidence, in the event that on rehearing the Commission is unwilling to change its finding that the use of 1383.55 acres of Tuscarora land interferes, and is inconsistent with, the purposes for which the Tuscarora Reservation was created.

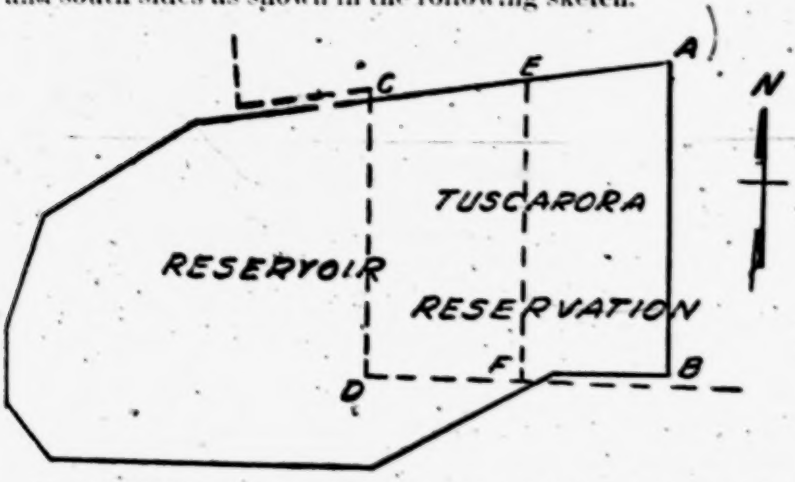
1. As stated in the petition for rehearing, 85.6 of the 1383.55 acres of Tuscarora land licensed by the Commission for Project 2216 was licensed for transmission line purposes, and counsel for Intervenor, Tuscarora Indian Nation, has conceded that use of Tuscarora land for such a purpose will not interfere, and is not inconsistent, with the purposes for which the Tuscarora Reservation was established (R. 3873-3874, 5589-5590).

2. About 35 acres of the 1383.55 acres of Tuscarora land licensed by the Commission for the project was licensed for [fol. 8597] roads and counsel for the Tuscarora similarly conceded that licensing for this purpose will not interfere and is not inconsistent with the purpose for which the Tuscarora Reservation was established (R. 3873-3874; See

also Intervenor's Brief submitted December 19, 1958, note 14.)

3. About 1263 acres or 20% of the reservation (rather than 22% as maintained by the Tuscarora) will be used for the reservoir itself as licensed and will either be flooded or be used as the site of dikes.

4. The design of the project's pump storage reservoir is such that the distance its north and south sides extend to the east determines the area the reservoir covers and its capacity. The easterly side connects with the north and south sides as shown in the following sketch.



If all 1383.55 acres of Tuscarora land licensed for the project are available the eastern side of the reservoir (A-B) will be approximately 8,000 feet east of the westerly reservation line, and the reservoir will have a capacity of 60,000 acre feet.

[fol. 8598] If no Tuscarora land were available, the easterly side of the reservoir would be at the very westerly edge of the Indian Reservation. (C-D) With the top of the dikes at elevation 655 and with a maximum 25 foot drawdown as planned, the reservoir would then have a capacity of 30,000 acre feet.

If a lesser amount of Tuscarora land were available and the eastern side of the reservoir were located somewhere between the reservation border (C-D) and where it is now

licensed to be (A-B) the area of the reservoir and therefore its capacity would be decreased below 60,000 acre feet depending upon the location of the eastern side of the reservoir. For example, if the eastern side were half way between the reservation border (C-D) and the place where the eastern side is presently planned to be (A-B) the reservoir would have a total area of about 2,070 acres taking in about 630 acres of Tuscarora land and would have a capacity of approximately 45,000 acre feet.

5. As can easily be computed from the map included in Exhibit 293, about 350 acres of Tuscarora land could be used for the reservoir without disturbing a single house on the reservation, and there would still be room inside the reservation for a road along the northerly, easterly and southerly dikes. (Under such an arrangement 125 acres of non-reservation land included in the reservoir as now licensed—which as a practical matter cannot be used if the eastern side of the reservoir is moved back to the reservation boundary—could be used for reservoir purposes.) This would result in a reservoir of about 1915 acres with a capacity of about 40,000 acre feet, if the height of the dikes and the maximum drawdown remain as planned.

[fol. 8599] 6. There are about 350 acres of swamp land in the interior of the reservation which has never been used for residential or agricultural purposes because they were unusable. The Authority has offered to drain this area and make it usable. If this were done and an equal amount of Indian Reservation land were made available for the reservoir, the reservation would not lose one acre of usable land and the reservoir would be increased by 350 acres.

Although the Power Authority unequivocally maintains that on all the evidence submitted to the Commission the licensing of 1383.55 acres of Tuscarora land for the Power Project will not interfere, or be inconsistent, with the purposes for which the reservation was established but on the contrary will assist in the carrying out of those purposes, and although the Authority agrees with the dissenting Commissioners that "the contention that the *amount* of land taken, measured as a proportion of the total" does

not govern and that a "far more rational test is whether the alienation—whether of one-half of one percent or ninety-nine percent—would be inconsistent or would interfere with the purpose of the reservation", nevertheless, in view of the decision of the majority of the Commission and because the use of any amount of Tuscarora land for reservoir purposes will increase *pro tanto* the dependable power capacity of the project, the Commission on rehearing—if it does not change its decision—is specifically requested to find that—

(a) the licensing of 85.6 acres of Tuscarora land for transmission line purposes will not interfere, or be inconsistent, with the purpose for which the reservation was established;

[fol. 8600] (b) the licensing of 35 acres or any lesser amount of Tuscarora land for roads will not interfere, or be inconsistent, with the purpose for which the reservation was established;

(c) the licensing for reservoir purposes of 350 acres of Tuscarora land upon which no dwellings are located will not interfere, or be inconsistent, with the purpose for which the reservation was established provided the license contains a condition requiring the licensee to drain and make usable the 350 acres of swamp land.

Since any amount of Indian land would be helpful to the project by increasing its capacity and reducing the cost of electricity, the Commission is also specifically requested to find whether the licensing for reservoir purposes of any amount of Indian land less than 350 acres or any amount of Indian land more than 350 acres but less than 1263 acres would interfere, or be inconsistent with, the purpose for which the reservation was established.

By making these requests we do not concede in any way that the existing license for Project 2216, which includes 1383.55 acres of Tuscarora land, interferes or is inconsistent with the purposes for which the Tuscarora Reservation was created or acquired.

We renew the request contained in the petition filed by the licensee on February 9, 1959, that the Commission grant

rehearing and upon rehearing make a finding that the licensing of 1383.55 acres of Tuscarora land will not interfere or be inconsistent with the purposes for which the Tuscarora reservation was created or acquired. We also renew the requests for other relief as sought in the peti-
[fol. 8601] tion.

Respectfully submitted,

Thomas F. Moore, Jr., General Counsel, Power Authority of the State of New York, 10 Columbus Circle, New York 19, New York.

Of Counsel: Samuel I. Rosenman, John R. Davison, Scott B. Lilly.

February 11, 1959

[fol. 8602] *Duly sworn to by Thomas F. Moore, Jr., jurat omitted in printing.*

[fol. 8603] Certificate of Service (omitted in printing).

[fol. 8624]

BEFORE FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey.

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317-A

OPINION AND ORDER DENYING APPLICATION FOR REHEARING—
(Issued February 25, 1959)

There is before us an application for rehearing filed February 10, 1959, and supplement thereto February 11,

1959, by the Power Authority of the State of New York with respect to our Opinion No. 317 issued February 2, 1959, in which we found under Section 4(e) of the Federal Power Act that the license issued to the Power Authority insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired. By permission the Tuscarora Nation filed an answer to the application for rehearing on February 17, 1959.

As set forth in our Opinion No. 317, the Power Authority was issued a license on January 30, 1958 (19 F.P.C. 186), in accordance with the Federal Power Act and Public Law 85-159, approved August 21, 1957 (71 stat. 401). The license was to develop its Niagara Falls Project No. 2216 and involved as proposed, the use of about 1,383 acres of lands of the Tuscarora for a reservoir and incidental works. Our Opinion No. 317 was issued upon remand by the United States Court of Appeals for the District of Columbia Circuit on November 14, 1958, to explore the possibility of making the finding required by Section 4(e) of the Federal Power Act, for the Court was of the opinion that Section 4(e) was applicable to the Tuscarora Lands as tribal lands under the definition of "reservations" in Section 3(2) of the Act.

In its application for rehearing the Power Authority contends that we have concluded erroneously that under Section 4(e) of the Act we may not license for reservoir purposes any land contained in a "reservation" within the meaning of the statute. This contention does not reflect the basis of our decision, which was that the particular power reservoir occupation of Indian land here involved would not meet the test of Section 4(e). We did not conclude that every occupation of reservation land was an interference with its purposes.

The Power Authority further contends in numerous particulars that we did not make correct or sufficiently detailed findings of fact. It contends that we did not make findings [fol. 8625] with respect to advantages accruing to the Tuscarora from the proposed transaction or with respect to the acquisition of equally desirable substitute lands for the Indians. This contention, we believe, is irrelevant, for

we were properly concerned only with the purpose for which this Indian land was acquired, and were not directed to consider alternative proposals, which might or might not be sociologically desirable, but which might be consistent with the purpose of the present reservation. The Power Authority says that we should have made findings of fact on the purposes of the reservation, the ownership of the land, supervision by the United States and the legislative history of the 1957 Act which authorized the project. We did make an essential finding of fact with regard to the purpose of the reservation, i.e. that it was acquired "for a homeland and a place to live and for farming and related uses". We were not required to make findings with respect the other matters, inasmuch as we found that the reservoir use would be inconsistent with purposes found by us.

The Power Authority has also requested specific findings as to whether the licensing of certain smaller amounts of Indian land for the project would meet the requirements of Section 4(e), and as to whether or not any Tuscarora land is necessary for the project. Specifically, they refer to (1) 85.6 acres for a site on which transmission lines are being built; (2) 35 acres or any lesser amount for roads, and (3) 350 acres for reservoir purposes. The Commission is also requested to find whether licensing for reservoir purposes of any amount of Indian land less than 350 acres, or more than 350 acres but less than 1263 acres would interfere with the purposes of the reservation.

What the Power Authority appears to be attempting is an informal amendment of its license with an immediate decision upon it without the benefits of a hearing. In our opinion the Power Authority misconceives its remedy. If we made the findings requested we would deny other parties the opportunity to be heard upon the question whether a different project interferes with the reservation. Furthermore, there is no application for definite amendment to the license before us upon which we can pass judgment. A different size or location for the reservoir would greatly affect its relationship to the Indian lands, particularly as to the area and location of the land taken. We cannot predict what effect the taking might have on the Indian

lands without knowing precisely where they will be located, the type of land taken, and other relevant facts. With respect to the acreage for transmission lines and roads, we will, of course, consider these matters when they are properly brought before us.

The proper remedy for the Power Authority is to file an amendment to its license, with amended exhibits as necessary. In this way we can pass upon a definite proposal, and the rights of other parties will be protected. We would then be free to consider whether a taking of Indian lands in the amount of any lesser acreage would be consistent with the purpose of the reservation.

[fol. 8626] The Power Authority makes the further contention that Commissioner Hussey improperly participated in the decision since he did not hear oral argument because of illness. The majority consisted of Chairman Kuykendall and Commissioners Kline and Hussey while Commissioners Stueck and Connole dissented. There is no requirement of oral argument in this proceeding arising from the Administrative Procedure Act, the Federal Power Act or our Rules. Commissioner Hussey, of course, had before him and read the transcript of the oral argument. No rights of the applicant were abrogated. *Sisto* v. *C.A.B.*, 179 F. 2d 47, 53-54 (CADC), *Eastland Co.* v. *F.C.C.*, 92 F. 2d 467 (CADC) *certiorari* denied 302 U.S. 735.

The Court of Appeals remanded the case in order that we might explore the possibility of making a finding required by Section 4(e). Had Commissioner Hussey refrained from voting the finding desired by the Power Authority could not have been made.

While we have reached a conclusion in Opinion No. 317 contrary to the Power Authority and are denying it rehearing, we do not feel we are precluded from contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

The Commission finds: -

No new facts have been presented or alleged, and no new principles of law have been set forth in the application for rehearing as supplemented which, either were not fully

considered by the Commission before it entered its Opinion No. 317 on February 2, 1959, or having now been considered, warrant rehearing or modification of the aforesaid order.

The Commission orders:

The aforesaid application for rehearing as supplemented is denied.

By the Commission. Commissioner Hussey concurring, filed a separate statement. Commissioners Stueck and Connole, concurring in part, dissenting in part, filed a separate statement.

Joseph H. Gutride,
Secretary.

[Emblem]
FEDERAL POWER COMMISSION

[fol. 8627] HUSSEY, Commissioner, *concurring*:

I concur in the order denying application for rehearing herein.

Eminent domain is a harsh and extraordinary remedy. Laws granting the right of eminent domain should be strictly construed, and the burden of proof in all such cases would rest on the one who seeks to exercise such rights. We are asked to make a finding under Section 4(e) of the Federal Power Act that the taking of 20% of the Indian lands, including 37 homes, would not interfere with the purpose for which the reservation was created. Such a finding would be the basis for a license under the Federal Power Act, which in turn would be a predicate for the exercise of the right of eminent domain by the Power Authority, and the burden of proof of non-interference under Section 4(e) would be upon the Power Authority.

In my judgment the Power Authority simply has failed to sustain that burden.

One of the reasons urged for rehearing by the Power Authority was that we did not unequivocally make the finding that the lands which they sought to occupy are the only ones available for these particular purposes. I do not believe that the Power Authority has proven that the particular lands which they desire to occupy would be the

only lands available for that purpose, either on or off the reservation.

An examination of Exhibit No. 315 mentioned in their Motion for Rehearing shows a swamp area within the reservation stated to contain approximately 350 acres. Instead of taking all of these swamp lands, the original project outlined in green on Exhibit 315 takes in only 100 acres of the swamp and substitutes highly improved lands and takes in other areas occupied by 37 homes. From an examination of this Exhibit, it would appear that the Power Authority could take all of the swamp lands and an additional 350 acres proposed in their amended application for rehearing, and some lands lying between these two areas, which would necessitate the removal of only one or two homes, and would cause minimum interference with the use of the reservation and would still make the project feasible.

Instead, the Power Authority has so designed this project to take in only a small amount of the swamp, and to take improved lands constituting 20% of the reservation and requiring the removal of 37 homes. This is exactly the type of situation that the Indian treaties and protective laws were designed to prevent.

[fol. 8628] In its Supplemental Petition for Rehearing the Power Authority now proposes to reduce the project and take only about 350 acres within the Indian reservation which would not cause the removal of any homes. In my judgment, this is a new project which would require a new hearing and a modified license, and it cannot be obtained through a motion for rehearing. However, if proper application were filed for such modified license, I see no reason that the matter could not be reopened and be reconsidered.

John B. Hussey, Commissioner

[fol. 8629] Coxxole and Stueck, Commissioners, *concurring* in part, *dissenting* in part:

For reasons fully set out in our separate statement, filed with the Commission's Opinion No. 317 issued February 2, 1959, we dissent from so much of this order that fails to reconsider the earlier action of the Commission.

Accordingly, we do not reach the question whether this Petition for Rehearing, as supplemented, amounts to an attempt by the Power Authority of the State of New York informally to amend its license without a hearing. It is clear, however, that since an affirmative finding under the proviso of Section 4(e) of the Federal Power Act could and should have been made by the Commission with respect to the previously proposed taking of a larger tract of Tuscarora land, we are necessarily bound to a similar finding with respect to the taking of a part of the same tract.

We concur that Commissioner Hussey's participation in this matter did not invalidate the order.

We concur also that the Commission is not precluded from contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

William R. Connole, Commissioner
Frederick Stueck, Commissioner

[fol. 8630]

BEFORE FEDERAL POWER COMMISSION

Project No. 2216

In the Matter of

POWER AUTHORITY OF THE STATE OF NEW YORK

BRIEF OF INTERVENOR, TUSCARORA INDIAN NATION
—Received December 19, 1958

Introductory Statement

On January 30, 1958, the Federal Power Commission issued a license to the Power Authority of the State of New York which purported to sanction the use of a substantial portion of the Tuscarora Indian Reservation for a water storage reservoir and related project works. Intervenor, the Tuscarora Nation of Indians, duly filed a petition for rehearing pursuant to Section 313(a) of the

Federal Power Act, 16 U.S.C. §825l(a), challenging the legality of including its lands within the scope of the license. On March 21, 1958, this Commission denied the petition for rehearing and within sixty days thereafter, on May 16, 1958, the Nation filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to the provisions of Section 313(b) of the Act, 16 U.S.C. §825l(b), as a party "aggrieved by an order issued by the Commission."

On November 14, 1958, the Court of Appeals ruled that the Commission cannot issue a license for the purpose of constructing a reservoir on tribal lands embraced within the Tuscarora Reservation in the absence of a finding required under the first proviso in Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), and remanded the case to [fol. 8631] the Commission to "explore the possibility of making that finding." *Tuscarora Indian Nation* v. *Federal Power Commission*, —— F. 2d —— (slip opinion, pp. 11-12). Section 4(e) of the Act reads in pertinent part:

> "[L]icenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired. . . ."

Under the mandate of the Court, therefore, the sole issues before this Commission are: (1) the purpose for which the Tuscarora Reservation was created or acquired; and (2) whether the proposed license will interfere or be inconsistent with that purpose.[1]

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[1] During the hearings, which lasted from November 24 through December 10, 1958, the Applicant, staff counsel and apparently the presiding officer adhered to the view that all questions raised in the original license proceeding were open for reconsideration. This position, of course, not only is contrary to the decision of the Court, but also conflicts with the language of this Commission's Notice of Further Hearing which speaks of a public hearing "upon the questions presented and for the purposes set forth in section VII of the aforesaid order of the Court. . . ." 23 *Fed. Reg.* 9101. Section VII of the Court's opinion relates exclusively to the finding under Section 4(e) of the Act.

ARGUMENT

1. *The Tuscarora Reservation was created and/or acquired as a homeland—inalienable without the Indians' consent—for the perpetual use, occupation and possession of the Tuscarora Nation.*

A. *A Permanent and Inalienable Homeland*

Historical records show that the Tuscarora Indians began to live on the site of their present Reservation at least by 1780. Exhibits 233, 235, 241-243. Four years later, on October 22, 1784, the United States entered into a Treaty with the Six Nations, 7 Stat. 15, Article II of which declares:

> [fol. 8632] "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

This promise of protection by the Federal Government was reaffirmed in Article 3 of the Treaty of January 9, 1789, 7 Stat. 33, which, however, remained unratified. In the Treaty with the Six Nations of November 11, 1794, 7 Stat. 44, popularly known as the Treaty of Canandaigua, the United States again solemnly agreed not to disturb the Indians, including the Tuscarora Nation,[2] in the "free use and enjoyment" of their lands, which "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

The Tuscarora Indians clearly understood the 1784 and 1794 Treaties as containing a binding promise by the United States to safeguard the peaceful use and enjoyment of the lands upon which they were settled until they

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[2] Under Articles II and III of the Treaty of Canandaigua, the Federal Government guaranteed certain lands to the Six Nations and "their Indian friends residing thereon and united with them." The fact that these stipulations covered the Tuscarora Nation is evidenced by the signature on the Treaty of "Kanatsoyh, alias Nicholas Kusik," identified as a Tuscarora under the name "Kanatjogh, or Nicholas Cusick" in the Treaty of December 2, 1794, 7 Stat. 47, and under the name "Ka-nat-soyh, or Nicholas Cusick" in the Treaty of January 15, 1838, 7 Stat. 550.

voluntarily elected to sell. Apart from the very language of the Treaties, this understanding is evidenced by the following quotation from a speech delivered on December 29, 1790, by President George Washington to chiefs of the Seneca Nation (Exhibit 240), which is representative of the assurances given the Six Nations, including Intervenor, by responsible government officials in the treaty-making era:

> "Here, then, is the security for the remainder of your lands. No State, nor person, can purchase [fol. 8633] your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights."
>
> * * * But your great object seems to be, the security of your remaining lands: and I have, therefore, upon this point, meant to be sufficiently strong and clear, that in future, you cannot be defrauded of your lands: that you possess the right to sell, and the right of refusing to sell, your lands: that, therefore, the sale of your lands, in future, will depend entirely upon yourselves."

In addition to these statements, the controlling rule of construction, repeatedly announced by the United States Supreme Court, is that a treaty with Indian tribes must be

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Compare instructions of Secretary of War Knox, dated December 4, 1793 to commissioners of the United States appointed to treat with certain western tribes, printed in *American State Papers, Indian Affairs* (Washington: Gales and Seaton, 1832), Vol. I, pp. 340-1, which read in part as follows:

> "You will, in all your negotiations, carefully guard the general rights of pre-emption of the United States to the Indian country, against all other nations and individuals, as established by the treaty of 1783, with Great Britain. But, in describing these rights to the Indians, you will impress them with the idea that we concede to them, fully, the right and possession of the soil, as long as they desire to occupy the same; but, when they choose to sell any portion of the country, it must be sold only to the United States, who will protect the Indians against all imposition."

interpreted "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

The Power Authority undoubtedly will contend first that the 1784 and 1794 Treaties do not apply to any portion of [fol. 8634] the Tuscarora Reservation, and, secondly, that the Tuscarora lands desired for project facilities lie wholly within the tract purchased for the Indians in 1804 by the Federal Government and that, regardless of the status of the remainder of the Reservation, the Treaties do not apply to such after-acquired property. This thesis overlooks the fact that in 1794 members of the Six Nations, including Intervenor, used and occupied all of the territory in and around the Tuscarora Reservation and thus enjoyed a treaty protection throughout that entire area. In 1797, the Seneca Indians, with the approval of the United States, sold the bulk of these lands to private parties, and in 1804 the United States repurchased a portion of the same tract in trust for the Tuscarora Nation. What Applicant is claiming, therefore, is that a 1797 transaction to which the Tuscarora Nation was not a party wiped out its treaty rights on the lands involved, and that the Indians' rights were not revived when the Federal Government reacquired part of the property on their behalf.

The Tuscarora Nation obtained title to its present territory in part by deed from the Seneca Nation of Indians, in part by grant from the Holland Land Company, and in part through purchase by the United States. *Tuscarora Nation et al. Indians v. Power Authority of the State of New York*, 257 F. 2d 885, 887 (C.A. 2, 1958); see also Exhibits 232A-232E, 232S, 232U-232V, 239, 241-243, 250.

Agreement entered into between Robert Morris and the Seneca Indians at Big Tree on September 15, 1797. N.Y. Leg. Doc. No. 51, 1889, pp. 131-134). Tr. 5142-5147.

Repeals by implication are not favored. *Federal Trade Commission v. A. P. W. Paper Co., Inc.*, 328 U.S. 193, 202 (1946); *A. B. Bill Steamship Co. v. Seafarers' International Union*, 250 F. 2d 326 (C.A. 2, 1957).

The Supreme Court twenty years ago decided that former non-Indian territory within an existing State (Nevada), purchased

[fol. 8635] This Commission, however, need never reach the merits of the Power Authority's contentions. The issue now under consideration is not whether the 1784 and 1794 Treaties apply to the Tuscarora Reservation as a matter of law, but rather the question is the purpose for which the Tuscarora Reservation was created or acquired. Applicant's own evidence purports to show that the Tuscarora Nation was "forgotten" at the 1797 Treaty (Exhibit 232A), and that the Seneca Nation and the Holland Land Company formally set aside lands for these Indians, to make up for that inadvertent omission. Exhibits 232A-232F, and 232V. The purpose for which the Tuscarora Reservation originally was established, therefore, is the same purpose for which lands had been set aside for the Six Nations, including Intervenor, under the 1784 and 1794 Treaties.

As previously noted, the 1784 and 1794 Treaties created homelands for the Six Nations, including the Tuscarora Nation, which were to be permanent and inalienable until the Indians voluntarily agreed to sell. Regardless of whether these Treaties still technically cover some or all of Intervenor's lands, the fact remains that the Tuscarora Reservation was established for the same salutary purpose.

B. *Perpetual Use, Occupation and Possession*

The record in this case discloses that, following the Treaty of September 15, 1797, Robert Morris deemed the claim of the Tuscarora Nation to the lands upon which it was settled to be "set just" that he "granted to those

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and set aside for a tribe by the United States, is Indian country within the meaning of the Federal liquor laws. *United States* v. *McGowan*, 302 U.S. 535 (1938). The general rule of law in international relations is that annexed territory becomes impressed with the treaties of the acquiring state. *Terlinden* v. *Ames*, 184 U.S. 270, 285 (1902); *Flushing & Bay Improvement Co.* v. *United States*, 59 F. 2d 464, 467 (C. Cls. 1932); *The Sophia Rickmers*, 45 F. 2d 413, 418 (D. S.D.N.Y. 1930); Hackworth *Digest of International Law* (Washington: Govt. Print. Of., 1943), Vol. 5, pp. 376-7.

These purposes were not affected by the 1797 Treaty since that agreement specifically provided that the lands still reserved to the Indians would remain their property "in as full and ample manner as if these presents had not been executed." Tr. 5145.

Tuscaroras, the use and occupation of that one Square [fol. 8636] Mile," subject to a preemptive right in favor of the Holland Land Company. Exhibit 232A. The Indians, expressing the view that the tract so granted was insufficient for their needs and did not include the whole of their houses and farms, requested that an additional area of land be set aside for their reservation. Exhibits 232B, 232D-232E. Shortly thereafter, the Holland Land Company authorized and directed its agent "to lay off two square miles of land to include the Tuscarora Village, *which land should be granted to the Indians for their sole use & benefit as long as they should think proper to reside thereon.*" Exhibit 232C; emphasis supplied. This tract and the Seneca grant[9] form the nucleus of the present Tuscarora Reservation.

At almost the same time, the Tuscarora Indians commenced dealings with the United States looking towards the sale of lands belonging to the Nation in North Carolina and the purchase of additional lands adjacent to their residence. Exhibits 232F-232J, 244-249. In the words of Longboard, one of the Tuscarora Chiefs, addressed to the Secretary of War:

> "The Tuscarora's wish from the avails of the land sold in North Carolina to purchase about five miles square of the Holland Company, joining to, and running parallel with the lands now possessed and occupied by the Tuscarora Nation." (Exhibit 232K.)

To this request the Secretary replied:

> "I will receive the money which may be transmitted by your agent in North Carolina, and have it safely lodged in the Bank, where it will rest until it can be applied to the object contemplated by you. . . ." (Exhibit 232K.)

In accordance with the foregoing promise, officials of the Federal Government carried on extensive and delicate

[9] The Seneca Nation granted Intervenor 640 more acres for "the sole and only proper use, benefit and behoof" of the Tuscarora Indians. Exhibit 232V.

negotiations for the purchase and sale of land on behalf [fol. 8637] of the Tuscarora Nation." Exhibits 2321-2320. Finally, on November 28, 1804, Secretary of War Dearborn advised the United States Indian Agent having jurisdiction over the Tuscarora Nation:

> "The bargain has been closed with Mr. Busti Agent for the Holland Company for the lands you agreed for on the part of the Tuskarora Indians and I have received a Deed of the same by which I am to hold the lands in trust for said Nation, and have made the first payment therefor with the money which had been ree'd for their lands in North Carolina— *You will therefore inform the Chiefs they may take possession of and occupy said lands as those of their Nation.*" (Exhibit 232Q; emphasis supplied.)

This tract includes all of the lands desired for project facilities by the Power Authority.

The foregoing review of the evidence conclusively demonstrates that the Tuscarora Reservation was created and/or acquired as a permanent homeland for the perpetual use, occupation and possession of the Tuscarora Nation.[11]

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[11] The role of the United States in acquiring the last 4329 acres within the Tuscarora Reservation has been judicially recognized. *Tuscarora Indian Nation* v. *Federal Power Commission*, —— F. 2d —— (C.A.D.C., November 14, 1958; slip opinion, p. 9.); *Tuscarora Nation* v. *Power Authority*, 257 F. 2d 885, 887 (C.A. 2, 1958).

[12] Notwithstanding Intervenor's vigorous objections, the Hearing Examiner permitted the Applicant to present testimony and related exhibits with respect to present use of Tuscarora lands. See, for example, Tr. 4329-4461, 4544-4671, 4842-4849, 5032-5057; Exhibits 168, 175-178, 203-205, 207 and 227. Present use, of course, has absolutely no bearing upon the purpose for which the Reservation originally was established and all of this material in the record, therefore, is irrelevant. Moreover, an existing non-conforming use, if any (and there are none), quite obviously would not make the proposed project facilities any more or less consistent with the purposes of the Reservation.

[fol. 8638]

II. *The proposed water storage reservoir and related project works for which the Power Authority seeks a license would interfere and be inconsistent with the purpose for which the Tuscarora Reservation was created or acquired.*

In this proceeding the Power Authority seeks a license permitting the use of 1383.55 acres of land within the Tuscarora Reservation for a permanent water storage reservoir and related project works. According to the opinion of the Court of Appeals, this Commission may issue such a license only after making the finding required under the first proviso of Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e). The Tuscarora Nation respectfully submits that this Commission cannot possibly find that a license, which in this case would completely oust an Indian tribe from a substantial portion of its lands, "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired. . . ."[12]

The evidence previously analyzed proves that the Tuscarora Reservation originally was established as a homeland—inalienable without the Indians' consent—for the perpetual use, occupation and possession of the Tuscarora Nation. If granted, the license demanded by the Applicant would allow the permanent flooding over Intervenor's protests of almost 1400 acres within that Reservation—forcing the eviction of approximately one hundred and twenty-five Indians from thirty-seven houses and depriving the entire Nation of its rights in those lands for all time. Tr. 4247-4248; see Finding Nos. 3 and 4, *infra*. By definition, [fol. 8639] the proposed reservoir will "interfere or be inconsistent"[13] with the purpose for which the Reservation

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[12] In the case of *In the Matter of Pigeon River Lumber Co.*, 1 F.P.C. 206, 12 P.U.R. (N.S.) 452 (May 20, 1935), the Secretary of the Interior declared that a proposed dam, which would flood a negligible fraction of the Grand Portage Indian Reservation, Minnesota, was inconsistent with the purpose for which the reservation was established.

[13] *The Oxford Universal Dictionary* (3d ed.) at p. 1026 defines the word "interfere" as "To strike against each other; to come into collision; to clash; to get in each other's way." The word "incon-

was established. Like their non-Indian neighbors, the Tuscaroras cannot live under water or build real homes in the air.

The fact that members of the Tuscarora Nation (including, perhaps, refugees from the reservoir site) may continue to occupy and possess the remaining 4866 acres within the Tuscarora Reservation is, of course, wholly immaterial. Section 4(e) of the Act does not require this Commission merely to find that the Indians still can exist and carry on their normal activities within the boundaries of a diminished reservation. On its face, Section 4(e) provides that the Commission must find that the license is consistent with the purpose for which the *entire* reservation was created or acquired—the area potentially covered by the license as well as the area not so covered. In determining whether the license will interfere with the original purpose of the Tuscarora Reservation, therefore, the Commission necessarily must ascertain whether these Indians will be prevented under the proposed project from using a ma- [fol. 8640] terial amount[14] of tribal land now in their possession. Where, as here, Intervenor will lose all of its rights to use, occupy and possess 1383.55 acres out of a total of only 6249, the license must be denied. The complete obligation of Indian residency and other ownership interests in a substantial portion of the Reservation as a matter of fact is not, and as a matter of law just cannot be deemed, compatible with the salutary reasons for establishing such a homeland.[15]

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sistent" is defined at p. 983 as "not agreeing in substance, spirit, or form; not in keeping; at variance, discordant, incompatible, . . ."

[14] Water conduits, transmission lines, power houses and access roads are examples of project works which generally do not require a material amount of land, which cause negligible interference with the use of property and thus which readily can be found consistent with the purpose for which a reservation was established. Accordingly, the Commission may license such facilities on tribal lands embraced within an Indian reservation. The utter destruction by flooding of more than 22% of an Indian reservation, as in this case, naturally presents a completely different situation—one where the Commission is barred under Section 4(e) from issuing a license in the absence of specific consent from Congress.

[15] This thesis finds support in the portion of Section 4(e) which provides that the license "shall be subject to and contain such con-

The plain language of Section 4(e) thus clearly safeguards the Tuscarora Nation against the despoliation of over 22% of its Reservation. Even if the Act were ambiguous, however, the Supreme Court repeatedly has ruled that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); see also *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *United States* v. *Nez Perce County, Idaho*, 97 F. 2d 232, 236 (C.A. 9, 1938). A corollary canon of statutory construction is that treaties with Indian tribes and laws affecting Indians must be liberally construed for the benefit and protection of the Indians. *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, [fol. 8641] 315 U.S. 681, 684-85 (1942). In the light of these principles of law, Section 4(e) of the Federal Power Act cannot be construed as authorizing the alienation and destruction of a substantial part of the Tuscarora Reservation.

Prior experience with the flooding of tribal lands under a license issued by the Commission confirms the proposition that a sizeable reservoir necessarily will interfere and be inconsistent with the purpose for which an Indian reservation was created or acquired. This Commission apparently has approved only two such projects—Kerr Dam on the Flathead Reservation, Montana, and Pelton Dam on the Warm Springs Reservation, Oregon. It is significant to note, therefore, that the flooding of tribal lands in both of these cases was authorized under a special statute: the

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ditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." This language would be meaningless if the Commission could license a reservoir on tribal property since the Secretary cannot protect and the Indians obviously cannot utilize lands under water.

Act of March 7, 1928, 45 Stat. 200, 212, with respect to the Kerr Dam; and the Act of June 25, 1910, 36 Stat. 855, 858, with respect to the Pelton Dam; see *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), at p. 438, fn. 5. Congress, therefore, affirmatively has indicated that the Commission may not license a substantial reservoir (as contrasted with a water conduit, transmission line or other facility which does not require a material acreage) on Indian tribal lands under Section 4(e) of the Act in the absence of specific legislative consent.[18]

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[18] In attempting a response to Intervenor's argument that a substantial reservoir may not be licensed under Section 4(e) in the absence of specific Congressional consent, the Power Authority has cited three more cases previously before this Commission: Wisconsin Power & Light Company, Project No. 710; Northern States Power Company, Project No. 108; and Uintah Power and Light Company, Project No. 190. Tr. 5437-5438. An analysis of these cases demonstrates that none supports the Applicant's position.

In the first place, the Northern States Power Company case actually involved a special Federal statute (39 Stat. 123, 157-158) authorizing the use of tribal lands within the Lac Court Oreilles Reservation for "storage-reservoir purposes." Secondly, the Uintah Power and Light Company case involved a diversion dam, canal and pipeline which covered only an infinitesimal fraction of the Uintah and Ouray Indian Reservation, consisting of more than 980,000 acres of tribal land; in addition, the applicant was required to make the canal available to irrigate Indian lands.

Lastly, the Wisconsin Power & Light Company case involved the flooding of between 160 and 200 acres of uninhabited forest land—less than one-tenth of 1% of the tribal holdings in the Menominee Indian Reservation. The applicant also received a preliminary permit with respect to five other sites in the Reservation, but this permit was not followed up and expired three years later on February 10, 1931. A preliminary permit, of course, unlike a license, does not call for a finding under Section 4(e).

Instead of refuting Intervenor's thesis, therefore, the cases cited by the Power Authority strengthen the view that this Commission under Section 4(e) may license facilities which do not require a material amount of Indian land, but may not license a substantial reservoir on tribal lands in the absence of specific Congressional consent.

[fol. 8642] PROPOSED FINDINGS OF FACT

FINDING NO. 1

The Tuscarora Reservation is an Indian reservation consisting of and embracing 6249 acres of tribal land in Niagara County, New York.

Supporting Evidence

The fact that the Tuscarora Reservation contains 6249 acres in Niagara County, New York, is not disputed. Exhibit Nos. 189, 234, 235, 236, 250 and elsewhere; see also "Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877" (Washington: Govt. Print. Of., 1877) at page 167.

The fact that the Tuscarora Reservation is an Indian reservation cannot be disputed. Exhibits 235, 236, 238 and 250-254; Tr. 5207-5209 and 5339-5356, especially 5350-5351. See also "General Data Concerning Indian Reservations," prepared under the direction of the Commissioner of Indian [fol. 8643] Affairs, U.S. Department of the Interior, dated October 15, 1929 (Washington: Govt. Print. Of., 1930) at page 10, and House Doc. No. 1590, 63d Cong., 3d sess., 1915, pp. 12-13, quoted in Cohen, *Handbook of Federal Indian Law* (Washington: Govt. Print Of., 1945) at page 423.

The fact that the Tuscarora Reservation is composed of tribal land also cannot be disputed. The Power Authority's own exhibits, for example, demonstrate that the Tuscarora Reservation was granted to, and acquired in the name of, the Tuscarora Nation. Exhibits 232A-232E, 232U, 232V, and 232X. There is nothing in the record to show any subsequent change of ownership. Indeed, as recently as January 4, 1954, the United States Department of the Interior advised Congress that the "dominant title" to the Tuscarora Reservation is still in the tribe. Tr. 5351.

Discussion

The Court of Appeals for the District of Columbia Circuit has ruled in this case that the Tuscarora Reservation consists of tribal lands embraced within an Indian reservation within the meaning of Sections 3(2) and 4(e) of the

Federal Power Act, 16 U.S.C. §§796(2) and 797(e).* *Tuscarora Indian Nation* v. *Federal Power Commission*, ——— F. 2d ——— (November 14, 1958; slip opinion, pp. 8-10). This Commission is bound by that determination.

In addition, the evidence noted above clearly shows that the U.S. Department of the Interior has recognized the Tus- [fol. 8644] carora Reservation as an Indian reservation. The recognition of an Indian tribe ~~is~~ a political decision with which the courts will not interfere. *United States* v. *Holliday*, 3 Wall. (U.S.) 407, 419 (1866); see also *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867); *United States* v. *Boylan*, 265 Fed. 165 (C.A. 2, 1920); *Tulla* v. *United States*, 32 C. Cls. 1 (1896); *Graham* v. *United States*, 30 C. Cls. 318 (1895). Only Congress may declare when the special relationship between Indian tribes and the Federal Government shall cease. *Winton* v. *Amos*, 255 U.S. 373,391-2 (1921); *United States* v. *Nice*, 241 U.S. 591, (1916); *Dewey County* v. *United States*, 26 F. 2d 434, 435 (C.A. 8, 1928). Congress, of course, has taken no such action with respect to the Tuscarora Nation or the Tuscarora Reservation. Tr. 5362.*

The evidence cited above further demonstrates that the Tuscarora Reservation, when originally created and/or acquired, was owned by the Tuscarora Nation. Federal statutes prohibit the alienation of Indian tribal lands without the consent of the United States, and invalidate any transfers in violation of these laws. 25 U.S.C. §§177 and 233; *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885 (C.A. 2, 1958). Since Congress never has agreed to a conveyance of lands belonging to the Tuscarora Nation, the conclusion follows axiomatically that this property remains in tribal ownership.

FINDING NO. 2

The Tuscarora Reservation was created and or acquired as a homeland—inalienable without the Indians' consent—

* The courts consistently have decided that Federal protections over Indian tribal lands apply to the Tuscarora Reservation. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885 (C.A. 2, 1958); *People ex rel. Cusick* v. *Daly*, 212 N.Y. 183 (1914).

for the perpetual use, occupation and possession of the Tuscarora Nation.

Supporting Evidence and Discussion

See Argument, pp. 2-8, *supra*.

[fol. 8645] Finding No. 3

The Power Authority of the State of New York seeks a license to construct a permanent water storage reservoir and related project works on 1383.55 acres of tribal land embraced within the Tuscarora Reservation.

Supporting Evidence and Discussion

The fact that the Power Authority seeks a license to construct a permanent water storage reservoir and related project works within the Tuscarora Reservation and that such facilities will cover 1383.55 acres of Indian land is not controverted. See, for example, Exhibits 161, 166 and 231; see also *Tuscarora Nation of Indians* v. *Power Authority*, *supra*, at 257 F. 2d 887-888; *Power Authority of the State of New York* v. *1383.55 Acres of Land, etc.*, Civil No. 7934 (W.D., N.Y.).

Finding No. 4

The proposed water storage reservoir and related project works described in Finding No. 3 would require the total eviction of the Tuscarora Indians from 1383.55 acres of tribal land, and thus would deprive the Tuscarora Nation without its consent of any and all use, occupation and possession of a substantial portion of the Tuscarora Reservation.

Supporting Evidence and Discussion

The fact that the project facilities proposed by the Power Authority would require the total eviction of the Tuscarora Indians from 1383.55 acres of land within the Tuscarora Reservation is not disputed and, indeed, is evidenced by the efforts of the Applicant first to appropriate and subsequently to condemn that property. *Tuscarora Nation* v.

[fol. 8646] *Power Authority, supra; Power Authority v. 1383.55 Acres of Land, etc., supra.* The fact that the Tuscarora Nation has not consented to any such taking or other disposition of tribal lands is proved by this case.*

During cross examination, witnesses for the Power Authority, including the resident engineer on the Niagara Project, testified that construction of the proposed project facilities would prevent members of the Tuscarora Nation from living on, farming or otherwise using 1383.55 acres within the Tuscarora Reservation. Tr. 4010-4011, 4381-4382. Actually, this Commission may take judicial notice of the fact that the proposed water storage reservoir and related project works can be completed and operated only if the present inhabitants of the area are permanently excluded from their property. The conclusion follows that the proposed project facilities would deprive the Tuscarora Indians of any and all use, occupation and possession of a substantial portion of the Tuscarora Reservation.

FINDING No. 5

The license requested by the Power Authority of the State of New York will interfere and be inconsistent with the purpose for which the Tuscarora Reservation was created or acquired.

Discussion

This Finding is an ultimate conclusion based upon Finding Nos. 1-4, inclusive. See Argument, pp. 9-12, *supra*.

[fol. 8647] CONCLUSION

In the light of the foregoing facts and applicable legal principles, this Commission may not enter the finding under the first proviso of Section 4(e) of the Act referred to in Section VII of the November 14 opinion of the Court of

* Although such material is completely irrelevant and was presented at the hearing over Intervenor's objections, the record shows that the dealings between the Tuscarora Nation and the Power Authority have not resulted in a voluntary settlement. Exhibits 181, 182 and 198; Tr. 4255-4256, 4323-4356, 4499-4507 and *passim* elsewhere.

Appeals. Accordingly, the Commission should enter an order amending its order of January 30, 1958, to exclude from the scope of the license granted the Power Authority any and all lands within the Tuscarora Indian Reservation, and should so report to the Court forthwith.

Respectfully submitted,

Arthur Lazarus, Jr., 1700 K Street, Northwest, Washington 6, D.C., Attorney for Tuscarora Indian Nation, Intervenor.

Of Counsel:

Eugene Gressman, 1700 K Street, Northwest, Washington 6, D.C.

Certificate of Service (omitted in printing).

[fol. 8667a] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor.

Before: Prettyman, Chief Judge, Edgerton and Danaher, Circuit Judges.

ORDER—February 24, 1959

Upon consideration of petitioner's motion for a judgment of reversal and an order on remand, of intervenor's petition for reconsideration of interlocutory holdings, and of inter

venor's motion for transmission of record, and of the answers and replies thereto filed, it is

Ordered by the court that petitioner's motion for a judgment of reversal and an order on remand, intervenor's petition for reconsideration of interlocutory holdings, and intervenor's motion for transmission of record are denied without prejudice to renewal upon the final disposition by the Federal Power Commission of applications to it for rehearing under Section 313 of the Statute, or upon expiration of the period for filing such applications.

Per Curiam.

Dated: February 24 1959

[fol. 8667b] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

[Title omitted]

INTERVENOR'S RENEWAL OF PETITION FOR RECONSIDERATION OF INTERLOCUTORY HOLDINGS—March 5, 1959

In conformity with this Court's Order of February 24, 1959, Intervenor herewith renews and resubmits its

1. Motion for Leave to File Petition for Reconsideration of Interlocutory Holdings Set Forth in November 14, 1958 Memorandum Opinion of this Court.

2. Petition for Reconsideration of Interlocutory Holdings, and

3. Brief in Support of Petition for Reconsideration, all filed in printed form with this Court February 5, 1959; also—

4. Intervenor's Reply to Petitioner's Opposition to that petition.

[fol. 8667c] The 30-day period under 313 of the Federal Power Act for filing with the Federal Power Commission applications for rehearing of the Commission's "final order"

(Opinion No. 317, Opinion and Finding) issued February 2, 1959, expired March 4, 1959. Intervenor is advised that all applications for rehearing of that order filed prior to that date have been finally disposed of by denial by the Commission. See, Commission's Opinion 317-A issued February 25, 1959, and Commission's Order issued March 3, 1959, both filed with this Court.

Intervenor by its Motion for Transmission of Record filed February 6, 1959, moved this Court for an order directing the Commission to transmit to the Court the record of the hearings held by the Commission on remand by this Court. That record has now been transmitted to this Court by the Commission.

The attention of the Court is called to the fact that the United States Supreme Court on February 23, 1959, denied petition for certiorari in No. 613, *St. Regis Tribe of Mohawk Indians* v. *New York* referred to on pages 27 and 29 of our brief in support of our petition for reconsideration. The United States Law Week (27 L.W. 3232) summarizes the ruling of the New York Court of Appeals (5 N.Y. 2d 24) thereby sustained, as follows:

> "Payment to St. Regis Indian Tribe under 1856 New York statute authorizing money grant for payment in full of Tribe's claim to Barnhart's Island in St. Lawrence River, extinguished any claim that Tribe had to Island and bars Tribe's just compensation claim arising [fol. 8667d] out of New York Power Authority's 1954 appropriation of Island for power project; Indian Intercourse Act of 1834, U.S.C. 177, restricting alienation of Indian reservation lands, does not apply to State of New York."

Respectfully submitted,

Thomas F. Moore, Jr., 10 Columbus Circle, New York 19, New York; Frederic P. Lee, 1200 18th Street, N.W., Washington 6, D. C., Attorneys for Intervenor.

Samuel I. Rosenman, John R. Davison, Scott B. Lilly, Of Counsel.

March 5, 1959

Certificate of Service (omitted in printing).

[fol. 8667e] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor,

UNITED STATES OF AMERICA, Amicus Curiae.

Before: Prettyman, Chief Judge, Edgerton, and Danaher, Circuit Judges, in Chambers.

ORDER DENYING INTERVENOR'S RENEWAL OF PETITION FOR RECONSIDERATION OF INTERLOCUTORY HOLDINGS

March 24, 1959

Upon consideration of intervenor's renewal of its petition for reconsideration of interlocutory holdings, it is

Ordered by the court that intervenor's renewal of petition for reconsideration of interlocutory holdings is denied.

Per Curiam.

Dated: March 24 1959

[fol. 8667f]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,475

TUSCARORA INDIAN NATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor,

UNITED STATES OF AMERICA, Amicus Curiae.

Before: Prettyman, Chief Judge, Edgerton and Danaher, Circuit Judges, in Chambers.

ORDER APPROVING LICENSE ISSUED BY THE COMMISSION EXCEPT INSOFAR AS IT WOULD AUTHORIZE THE CONDEMNATION OF INDIAN LANDS—March 24, 1959

Whereas we held in our opinion filed herein November 14, 1958, that the finding required by Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), is necessary to the validity of a license purporting to authorize the condemnation of Tuscarora Indian tribal lands, and remanded this case to the Federal Power Commission for further proceedings;

And Whereas on February 2, 1959, after extensive hearings, the Commission, in an opinion and finding, reported to this court that under the facts presented it could not make the finding required;

And Whereas the petitioner subsequently moved for final determination of issues, the respondent moved for reconsideration and for final determination of issues, the intervenor moved for renewal of its petition for reconsideration of interlocutory holdings, and the United States, having been admitted as *amicus curiae*, moved for reconsideration and for oral argument, and the court having duly considered the foregoing motions and report of the Commission;

Now, Therefore, It Is Ordered by the court that the license issued by the Commission to the Power Authority of the State of New York for the Niagara River Project is approved except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir [fol. 8667g] purposes, and further ordered that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes.

Per Curiam.

Dated: March 24, 1959

[fol. 8667j] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 8667k]

SUPREME COURT OF THE UNITED STATES

No. 911, October Term, 1958

FEDERAL POWER COMMISSION, Petitioner,

vs.

TUSCARORA INDIAN NATION.

ORDER ALLOWING CERTIORARI. June 22, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 921 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 86671]

SUPREME COURT OF THE UNITED STATES

No. 921, October Term, 1958

POWER AUTHORITY OF THE STATE OF NEW YORK, Petitioner,

vs.

TUSCARORA INDIAN NATION.

ORDER ALLOWING CERTIORARI—June 22, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 911 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

ILE COPY

Exhibits

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 63—Petition for Certiorari Filed May 12, 1959
No. 66—Petition for Certiorari Filed May 13, 1959
Certiorari Granted June 22, 1959

Exhibit No.	*Description of Document*	*Page*	*Transcript*
13	Document entitled "Required Capacity of Pumped Storage Reservoir"	1	4025–4032
18	Map entitled "Niagara-Mohawk Land Within Power Authority Taking Line"	11	4040
161	Map entitled "Tuscarora Reservoir Proposed Alignment Scheme No. 1"	13	7749
162	Map entitled "Tuscarora Reservoir—Alternate Scheme No. 2"	15	7750
163	Map entitled "Tuscarora Reservoir—Alternate Scheme No. 3"	17	7751
164	Map entitled "Tuscarora Reservoir Alternate Scheme No. 5"	19	7752
165	Map entitled "Tuscarora Reservoir Alternate Scheme No. 4"	21	7753
167	Order issued May 5, 1958, approving Exhibit J drawing as part of license for Project No. 2216	23	7755
181	Document entitled "Open Letter to the Tuscarora Indian Nation"	25	7856–7862
186	Copy of an item entitled "Tuscarora Council unanimously reject SPA Bid to make survey on Reservation" from the Niagara Falls Gazette, March 7, 1957	27	7878 7879
187	Copy of the Niagara Falls Gazette, dated January 28, 1957	29	7880 7881
189	Map entitled "General Map of Reservoir, Alternate Reservoir and Reservation Area"	31	7882
190	An enlargement of a single photograph taken from a point over Canada looking approximately due east toward the city of Lockport	33	7883

Exhibit No.	Description of Document	Page	Transcript
191	26th annual report of the Power Authority of the State of New York, dated January 28, 1957: cover, pages 11-13, 38-43	35	7884; 7896-7898; 7923-7928
192	Letter of enclosure transmitted with 6 copies of the report to Mr. Rickard on Jantuary 29, 1957	45	7938
193	Letter of confirmation of meeting date of March 6th, sent to Mr. Mount Pleasant with a copy of 26th annual report	46	7939
207	Document entitled "1954 Census of Agriculture, Niagara County," dated November, 1957, prepared by C. A. Bratton	47	8119-8142
208	Table of population of Tuscarora Indian Reservation, by race and sex in 1950	70	8143
209	Table of employment on the reservation of persons 14 years old and over	71	8144
210	Treasury Book (List of Enrolled Indians)	73	8145-8182
212	Letter dated September 30, 1957 from Fred G. Aandahl, Assistant Secretary of the Interior to Hon. Jerome K. Kuykendall, Chairman Federal Power Commission	111	8185-8188
	Letter dated November 1, 1957 from Mr. Fred G. Aandahl to Hon. Jerome K. Kuykendall	114	8188-8189
	Letter dated November 1, 1957 from Fred G. Aandahl to Harry G. Patterson, Tuscarora Nation	115	8189-8191
	Letter from The Majority of Chiefs of The Tuscarora Indian Nation to His Excellency, Dwight D. Eisenhower, The Honorable Fred A. Seaton, Secretary of the Interior and	118	8192-8193

Exhibit No.	Description of Document	Page	Transcript
	The Honorable Jerome K. Kuykendall received by F. P. C., November 1, 1957		
	Letter dated September 12, 1956 to Honorable Fred A. Seaton from Leon M. Fuquay, Secretary of F. P. C.	119	8193-8194
	Letter dated October 2, 1956 to Honorable Fred A. Seaton from Leon M. Fuquay	121	8195
	Letter dated August 27, 1957 to Honorable Fred A. Seaton from Michael J. Farrell, Acting Secretary of F. P. C.	121	8195-8196
213	Letter dated November 17, 1958, from Arthur Kline, Acting Chairman of F. P. C. to the Honorable Fred A. Seaton	123	8197
214	Letter dated November 20, 1958, signed by Arthur Kline, Acting Chairman, F. P. C. to the Honorable Fred A. Seaton, Secretary of the Interior	124	8198
215	Letter dated November 21, 1958, from Acting Secretary of the Interior Elmer Bennett, to the Honorable Jerome K. Kuykendall, Chairman F. P. C.	125	8199
216	Letter dated December 3, 1958, from Elmer Bennett to Jerome K. Kuykendall	126	8200-8201
217	Letter dated December 19, 1958, from Elmer Bennett to Jerome K. Kuykendall	128	8202-8203
218	Brochure entitled "As a Result of the Destruction in 1956 of the Schoellkopf Power Plant . . . the Niagara area is faced with an emergency" dated July 25, 1957	131	8204-8222
219	Distribution sheet "Release—Niagara Brochure" July 25, 1957	151	8223

Exhibit No.	Description of Document	Page	Transcript
220	Statement of the Power Authority of the State of New York, to the members of the Senate of the United States, dated August 8, 1957	152	8224-8225
221	Distribution sheet, August 8, 1957 Statement	154	8226
229	Letter dated February 11, 1939 to W. K. Harrison U. S. Government Agent for Indian Affairs from J. E. Donald Hastie	155	8280
	Letter dated February 21, 1939 to J. E. Donald Hastie from Chas. H. Berry	156	8282
231	A map showing Tuscarora Reservation indicating Land needed for Reservoir	157	8289
232	A book entitled "Exhibits lettered A to X submitted by Licensee, Power Authority of the State of New York," dated November 24, 1958	159	8290-8349
235	Excerpts from the Assembly Document No. 51 of 1889, Assembly of the State of New York dated February 1, 1889	205	8367-8375
237	Reference to photostat of a document in the records of the Niagara County Clerk, purporting to be a grant from the Tuscarora Nation of Indians in 1835 to the Lockport & Niagara Falls Railroad Co.	214	8378
238	Letter of June 13, 1912, from the Department of the Interior, addressed to Mr. Edgar H. Rickard, Secretary for the Tuscarora Nation	215	8379-8380
239	Map entitled "Tuscarora Reservation" with various treaty lines marked	217	8381

Exhibit No.	Description of Document	Page	Transcript
240	Reply of George Washington, President of the United States, to the speech of three chiefs of the Seneca Nation of Indians, one of the Six Nations, dated December 29, 1790	218	8382–8383
241	An excerpt from "Proceedings of the Commissioners of Indian Affairs," edited by Franklin B. Hough	220	8384
242	An excerpt from Turner, *The Pioneer History of the Holland Purchase of of Western New York*	221	8385
243	An excerpt from Royce, *Indian Land Cessions*, 18th Annual Report of the Bureau of American Ethnology, Part 2	222	8386
244	Letter from Secretary of War Dearborn to William R. Davie dated December 28, 1801	223	8387
245	Letter from Secretary of War Dearborn to William R. Davie, dated October 18, 1802	224	8388
246	Letter from Secretary of War Dearborn to Benjamin Williams, dated October 18, 1802	225	8389
247	Series of documents with a cover letter from President Thomas Jefferson to the Senate, dated February 21, 1803, including articles of a treaty between the United States of America and the Tuscarora Nation of Indians and a letter of W. R. Davie dated February 3, 1803	226	8390–8392
248	Letter dated June 20, 1803 from I. Slade and William Hawkins, Commissioners for The Tuscarora Indians to the Secretary of War with enclosures running a total of four pages	229	8393–8396

Exhibit No.	*Description of Document*	*Page*	*Transcript*
249	Letter from Secretary of War Dearborn to J. Slade (assumed to be I. Slade) dated July 2, 1803	233	8397
250	An opinion to the Secretary of the Interior from Willis Van Devanter, Assistant Attorney General, dated May 4, 1900	234	8398-8402
251	Letter dated June 6, 1921 from E. C. Finney, First Assistant Secretary of the Department of the Interior to Chief J. Warren Braley	239	8403
252	Letter dated December 29, 1921 from Edgar H. Rickard of Sanborn, New York, to Charles H. Burke, Commissioner of Indian Affairs	240	8404
253	Letter dated January 25, 1922 from E. B. Meritt, Assistant Commissioner of Indian Affairs to Edgar H. Rickard, Secretary for the Tuscarora Indians	241	8405
254	Letter dated July 9, 1958 to Arthur Lazarus, Jr., from Elmer F. Bennett, Solicitor of the Department of the Interior	242	8406
255	House Concurrent Resolution 108 dated August 3, 1953	243	8407

Exhibit 13

EXHIBIT 13 REQUIRED CAPACITY OF PUMPED STORAGE RESERVOIR.

To establish the capacity required for the pumped-storage reservoir, it is necessary to study the overall operation of the Niagara Power Project for the critical months of October and December as shown graphically by Plates I and II.

Plate I depicts power operations for the month of December. An inspection of the period of record shows the average flow available for power Monday thru Sunday (December 19-25, 1941)* of the lowest weeks' flow of record to be:

		12 hr. daytime	12 hr. nighttime
M	12-19	56,400 cfs	56,400 cfs
T	-20	55,000	55,000
W	-21	50,200	50,200
T	-22	53,500	53,500
F	-23	53,000	53,000
S	-24	62,500	62,500
S	-25	53,500	53,500
		7)384,100 cfs	7)384,100 cfs
		55,000	55,000
Minimum monthly thus Dec. 1933			171,800 cfs
- Diversion			5,200
			166,600
- 50,000 cfs to Niagara Falls			50,000
Available to U. S. & Canada			2)116,600
Available to PASNY			58,300

Since the allowable day and night flows are the same during the month of December and since there is comparatively small difference between the

---

* No daily records available until 1935 so use lowest available Dec. 19-25, 1941)

average flow for the minimum week and the minimum average flow of record, we may with sufficient accuracy use the latter for computing the storage reservoir capacity required for December.

As is frequently the case in hydraulic computations the reservoir capacity must be determined by successive trial and adjustment computations. Studies of the electric load indicate that the maximum peak load on the system will reach 4,230,000 KW in December 1963, with a minimum of 2,830,000 KW during the same month as shown on the diagram. 400,000 KW are carried on a 24-hour basis and the remaining power available from the Project is used to supply a 17 hour duration peak load. Slightly different loads occur during October as shown on Plate II. Knowing the power available from river flow, several trials were made until a point of balance is reached such that the reservoir refills during one week equals the withdrawals during the same period. It was found that the Project could supply 1,800,000 KW so that of the 4,230,000 KW total connected load, 2,430,000 KW would be supplied by steam plants. The steam plants would operate at nearly 100% load factor which results in maximum economy. Under this arrangement, each day Monday thru Friday we shall be required to withdraw water from the reservoir, and during off peak hours we shall be able to make partial restoration of water to the reservoir Monday thru Thursday nights. The reservoir capacity required is the net volume of water withdrawn from the reservoir Monday thru Friday as indicated by the following computation.

For convenience the charts were drawn in terms of megawatt versus hours. The area represents megawatt hours. The volume of water may be obtained from the megawatt hours as follows:

Pumping Efficiency	90.0%
Total station efficiency	86.2%
Total head with both Lewiston and Tuscarora generating	375 ft.
Total head with Lewiston generating and Tuscarora pumping	379 ft.

On withdrawal from storage

$$\frac{(736 \text{ ft lbs/sec/kw})\ (3600 \text{ sec/hr})}{(62.5 \text{ lbs/cu ft})\ (375 \text{ ft head})\ (0.862)\ (43,560 \text{ cu ft/acre ft})} = 3.02 \text{ acre ft. per MWH}$$

When storing

$$\frac{736 \times 3600 \times .90}{(62.5) \times 379 \times .862 \times 43560} = 2.69 \text{ acre ft/MWH}$$

December 1963

The energy available from river flow during December is:

$$\frac{58300 \text{ c.f.s.} \times 62.5 \times 306}{736} \times 0.862 = 1,302,000 \text{ kwh/hr 24 hrs. daily}$$

Withdrawals from storage

4,230 MW
3,732 MW
498 MW for 17 hrs.

498MW x 17 hrs x 3.02 = 25,600 A.F.

For 5 days: 5 x 25,600 = 128,000 A.F.

Placed in storage

3,732 MW
2,830 MW
902 MW for 7 hrs.

902 x 7 x 2.69 = 17,000 A.F.

For 4 nights:

4 x 17,000 = 68,000 A. F.

Storage Required Monday thru Friday

126,000 - 68,000 = 60,000 A.F.

Weekend Replenishment

3,732 MW
2,830 MW
902 MW for 21 hrs.

902 x 21 x 2.69 = 50,900 A.F.

3,732 MW
3,544 MW
197 MW for 17 hrs.

197 x 17 x 2.69 = 9,100 A.F.

50,900 + 9,100 = 60,000 A.F. Weekend Storage

60,000 A.F. required

From all practical purposes the diagram has been balanced showing that to maintain a dependable capacity of 1,800,000 KW (4,230 - 2,430) a reservoir capacity of 60,000 Acre-Feet is necessary. The month of December is critical for dependable capacity.

October 1963

We proceed in Plate II to make a similar study for the month of October. An inspection of the period of record shows the average flow available for power to be Monday thru Sunday (October 28 - November 3, 1941) to be:

		12 Hr. Daytime	12 Hr. Nighttime
M	10-28	32,500	57,500
T	29	30,000	55,000
W	30	32,500	57,500
T	31	26,500	51,500
F	11- 1	44,000	69,000
S	11- 2	47,000	72,000
S	3	36,000	61,000
		7)248,500	7)423,500
		35,500	60,500

October 1963

Withdrawals from Storage

Monday thru Friday

4,060 MW
3,750 MW
310 MW for 14.5 hrs.

3,750 MW
3,197 MW
553 MW for 12 hrs.

310 x 14.5 x 3.02 = 13,600 A.F.
553 x 12 x 3.02 = 20,100 A.F.
33,700 A.F.

For 5 days: 5 x 33,700 = 169,000 A.F.

Placed in Storage

3,750 MW
2,680 MW
1,070 MW for 9.5 hrs.

1070 x 9.5 x 2.69 = 27,300 A.F.

For 4 nights: 4 x 27,300 = 109,000 A. F.

Storage Required

169,000 - 109,000 = 60,000 A.F.

Weekend Replinshment

3,750 MW
2,680 MW
1,070 MW for 28.5 hrs.

3,750 MW
3,500 MW
250 MW for 5 hrs.

1070 x 28.5 x 2.69 = 82,000 A. F.
250 x 5 x 2.69 = 3,360 A. F.
85,360 A. F.

3,500 MW
3,197 MW
303 MW for 24 hrs.

303 x 24 x 3.02 = 22,000 A. F.

85, 360 - 22,000 = 63,360 A. F. Possible which is slightly more than required. o.k.

These computations show that for either October or December 60,000 Acre Feet of reservoir capacity is required to obtain optimum use of the available water.

Exhibit 19

PLATE I

4031

M.W. CONNECTED LOAD

5000

4000

3000

2000

1000

0

17 Hrs.

Connected Load

Power available from river flow

3544

7 Hrs

4230

3710

2830

2430

FRI. | SAT. | SUN. | MON. | TUE | WED. | THUR. | FRI.

LEGEND:

- Power withdrawn from storage
- Power placed in storage
- Power from direct diversion
- Power from other sources

ASSUMED LOAD FOR DEC. 1963
OMITTING 250 M.W. CARRIED
BY PRESENT & PLANNED HYDRO
OTHER THAN NIAGARA.

:9: PLATE II

Exhibit 12

M.W. Connected Load

5000
4000
3500
3000
2000
1000
0

Connected Load
14.5 Hrs.
12 Hrs.
Power available from river flow
12 Hrs.
9.5 Hrs.
Flood Week-End Storage 60,000 A.F.

4060
3750
3197
2680
2430

FRI. SAT. SUN. MON. TUE. WED. THUR. FRI.

LEGEND

- Power withdrawn from storage
- Power placed in storage
- Power from direct diversion
- Power from other sources

ASSUMED LOAD FOR OCT. 1963
OMITTING 250 M.W. CARRIED
BY PRESENT & PLANNED HYDRO
OTHER THAN NIAGARA

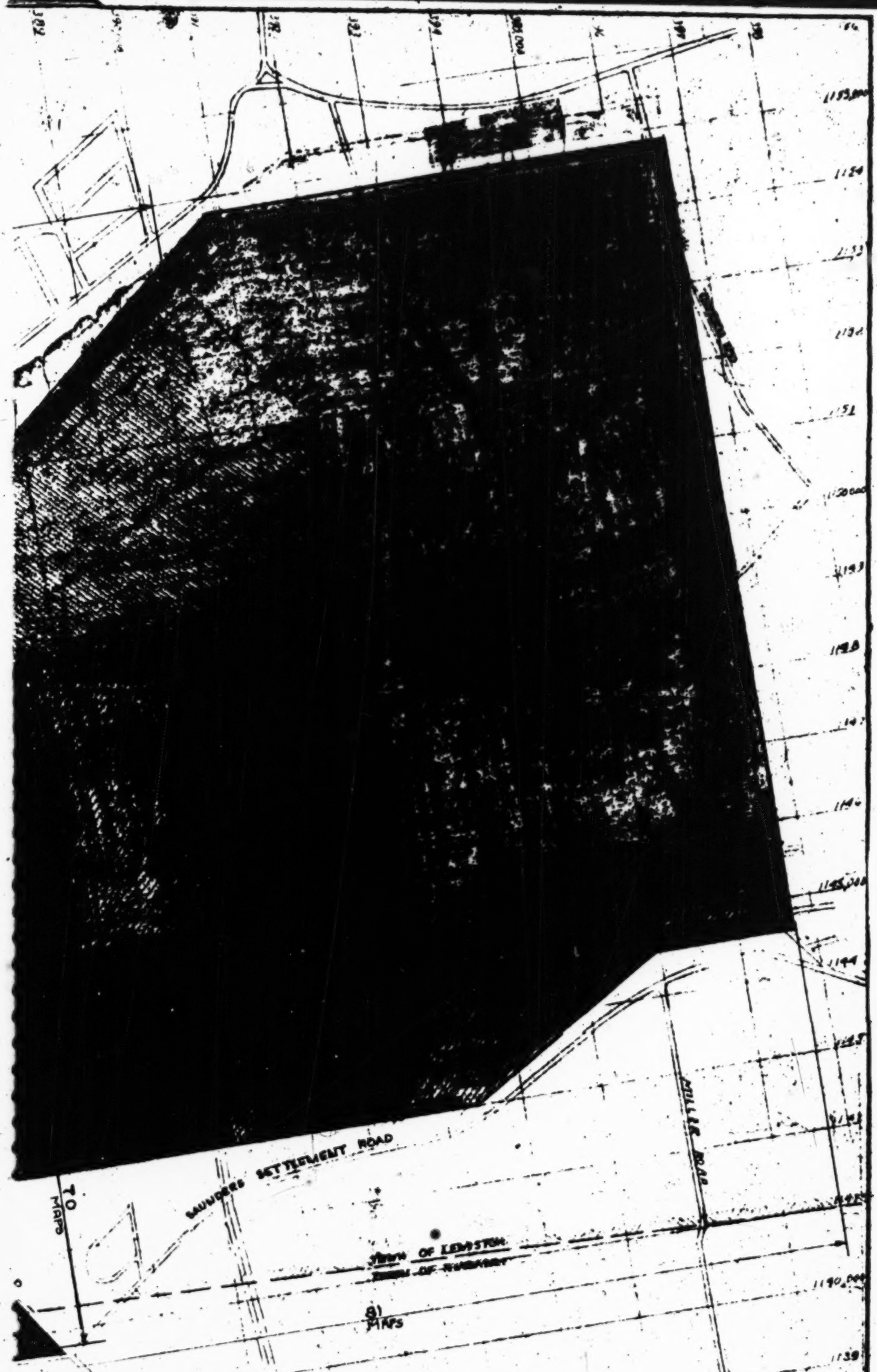

SAUNDERS SETTLEMENT ROAD
TO MAPS
TOWN OF LEWISTON
TOWN OF NIAGARA
81 MAPS
PHILLIPS ROAD

Exhibit 18

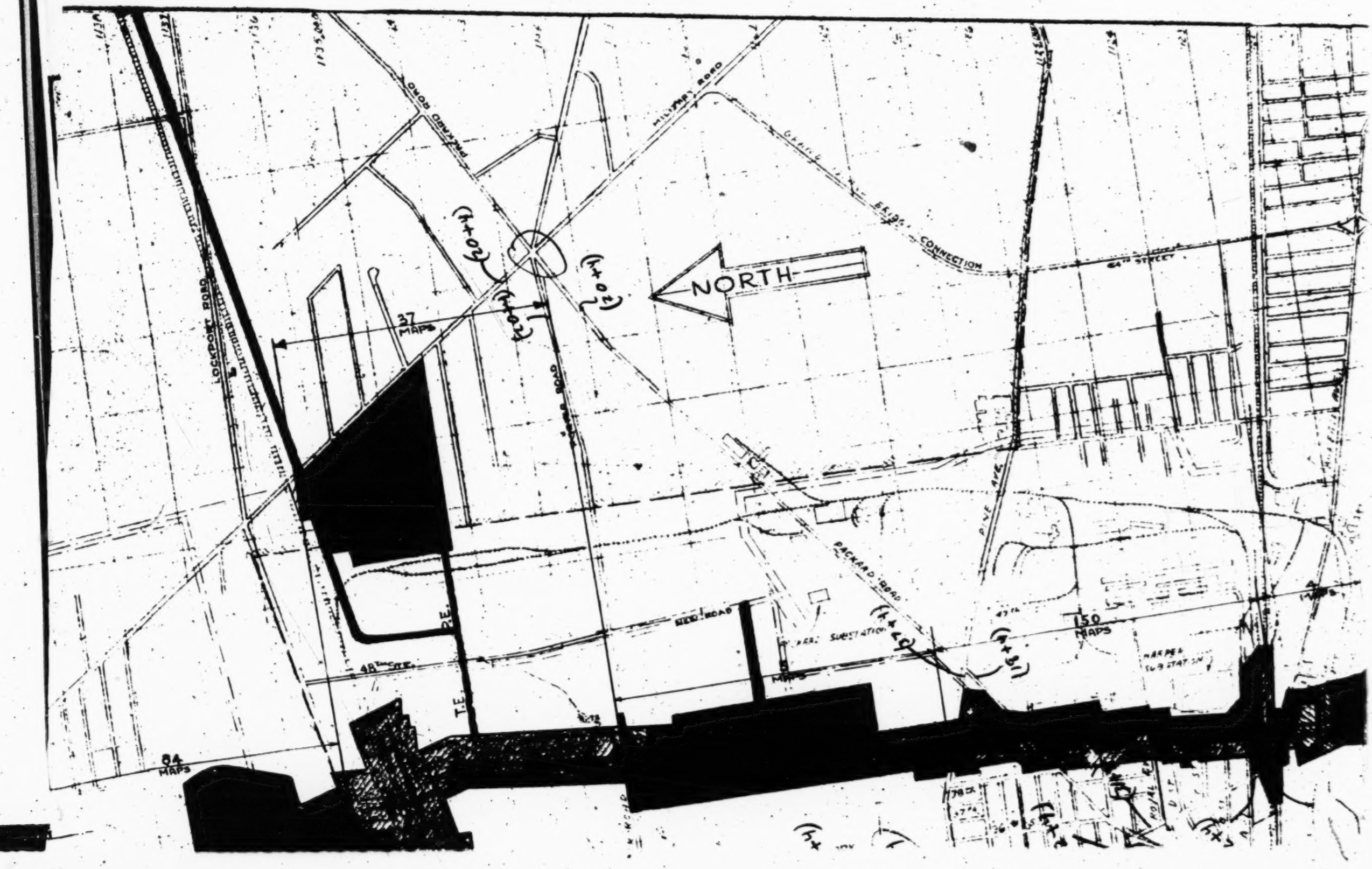
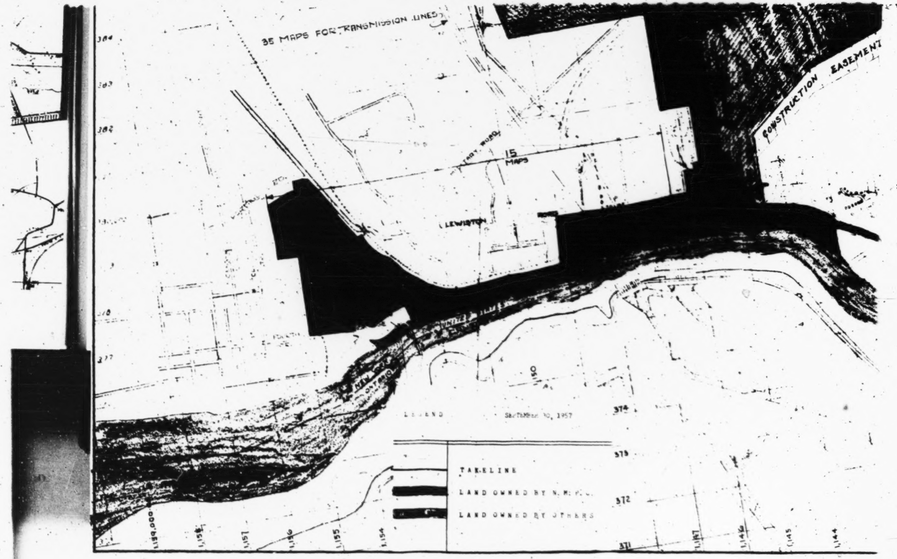
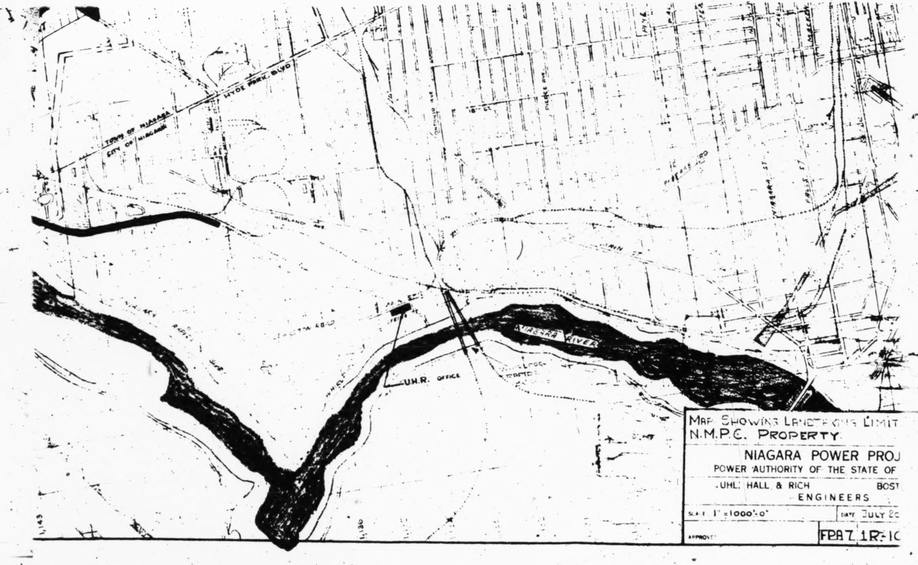

LOCKPORT ROAD
PACKARD ROAD
MILLPORT ROAD
GRADE SEPARATION
CONNECTION
NORTH
37 MAPS
(1+02)
(1+02)
(1+02)
48" SCE
T.E.
84 MAPS
PACKARD ROAD
(1+47)
(1+61)
150 MAPS
MAPES SUB STATION
PINE AVE

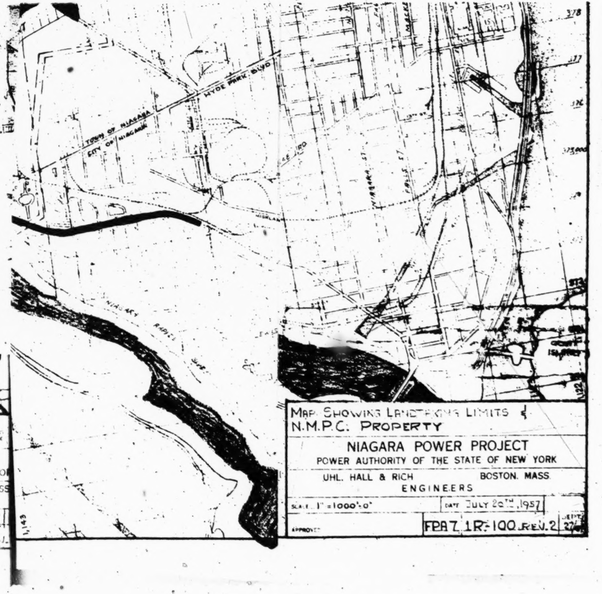
Exhibit 18 4040




BRONSON DRIVE
LEWISTON
15 MAPS
CONSTRUCTION EASEMENT
TOWN OF NIAGARA
CITY OF NIAGARA FALLS
NIAGARA RIVER
U.S.R. OFFICE


85 MAPS FOR TRANSMISSION LINES
CONSTRUCTION EASEMENT
LEVISTON
15 MAPS
LEGEND
TABELINE
LAND OWNED BY N.M.P.C.
LAND OWNED BY OTHERS


TOWN OF NIAGARA
CITY OF NIAGARA FALLS
NIAGARA RIVER
U.S.R. OFFICE
MAP SHOWING LANDS AND WATER RIGHTS LIMITS
N.M.P.C. PROPERTY
NIAGARA POWER PROJ
POWER AUTHORITY OF THE STATE OF
UHL, HALL & RICH
BOST
ENGINEERS
SCALE 1" = 1000'-0"
DATE JULY 2
FPA 7 1R-10


TOWN OF NIAGARA
CITY OF NIAGARA FALLS
MAP SHOWING LANDS AND WATER RIGHTS LIMITS
N.M.P.C. PROPERTY
NIAGARA POWER PROJECT
POWER AUTHORITY OF THE STATE OF NEW YORK
UHL, HALL & RICH
BOSTON, MASS
ENGINEERS
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DATE JULY 26TH, 1957
FPA 7 1R-100 REV. 2

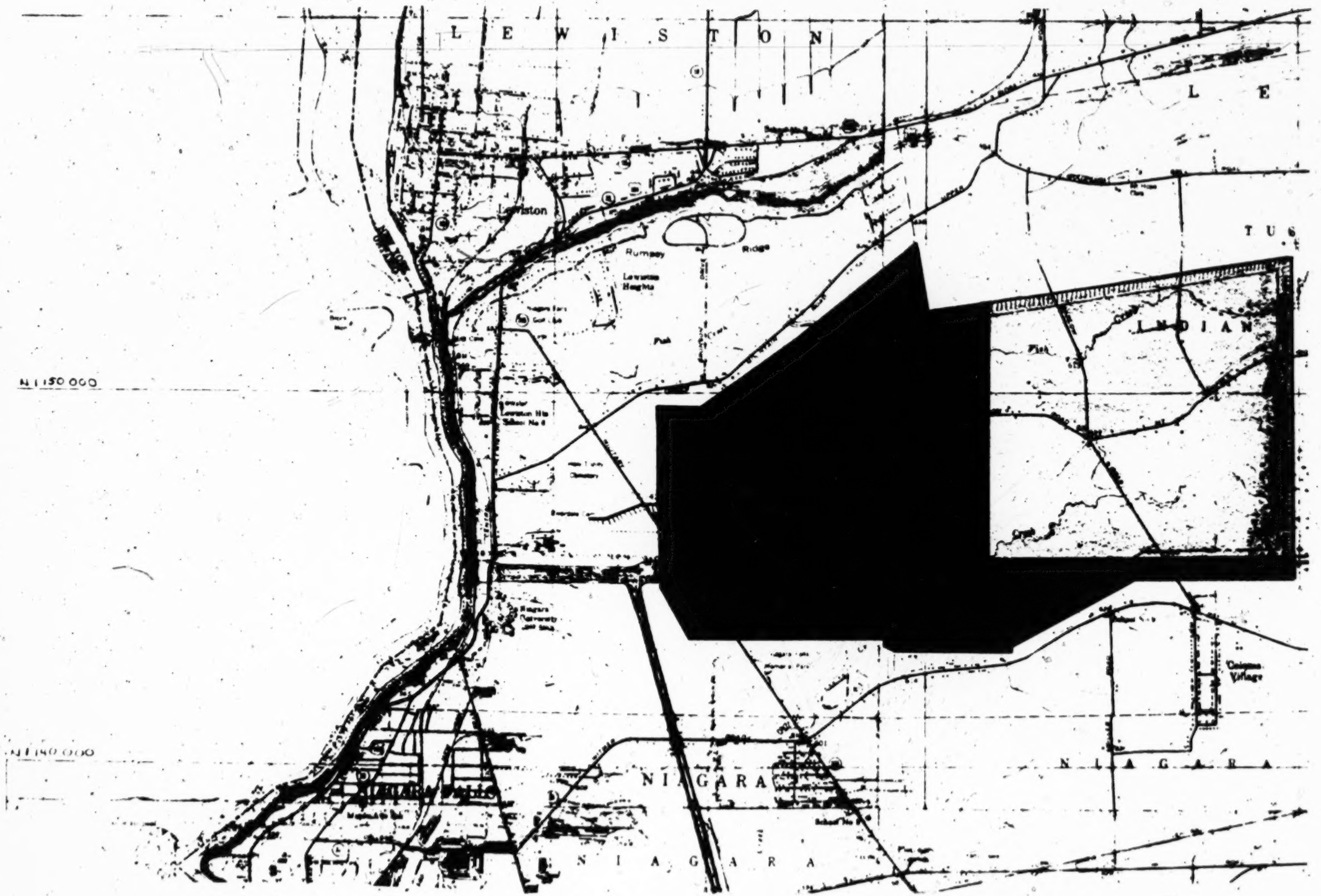
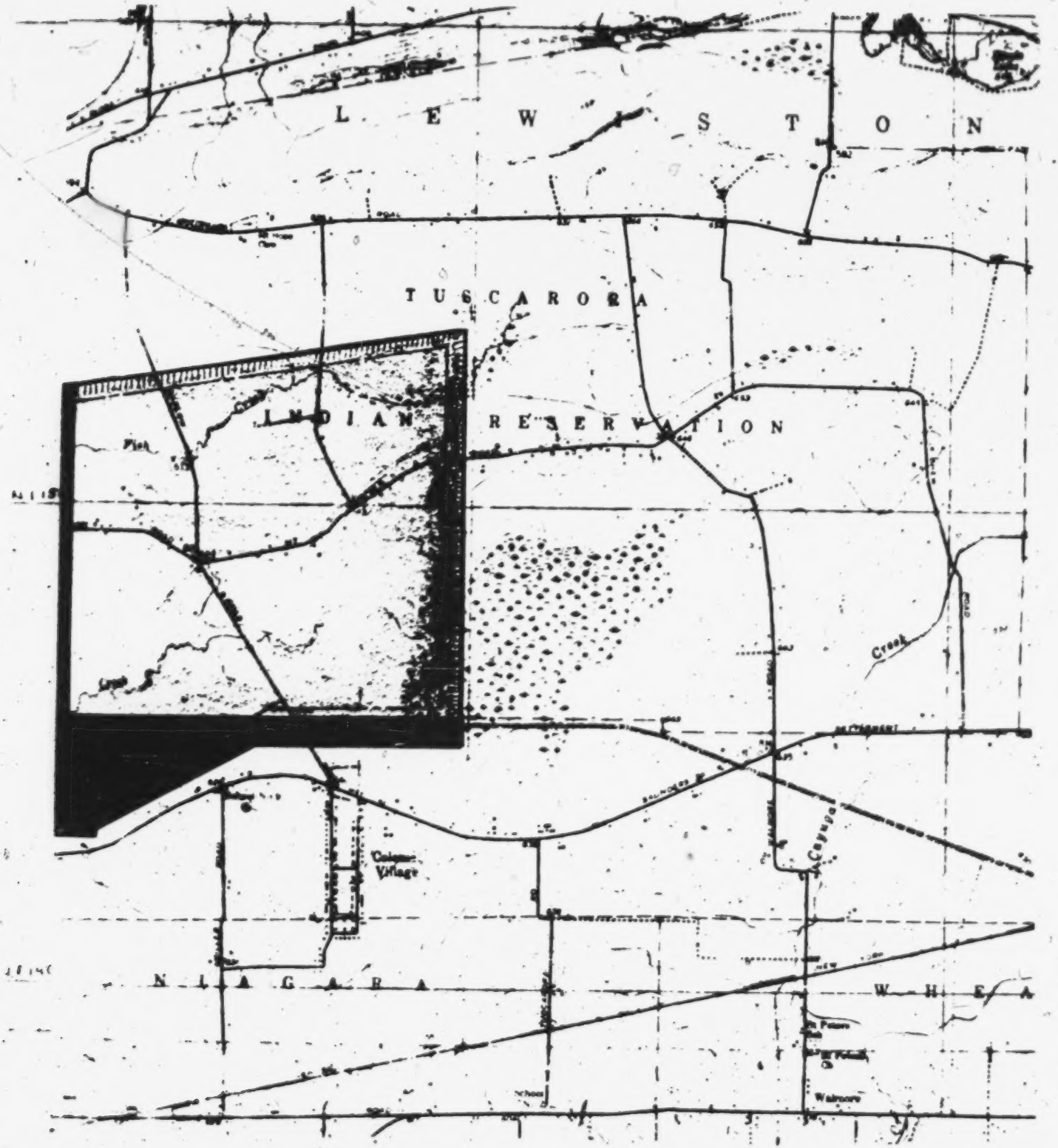

L E W I S T O N
L E
T U S
Rumsey
Ridge
Lewiston Heights
I N D I A N
N I A G A R A
N I A G A R A
N 1 150 000
N 1 140 000

Exhibit 161 7749



Exhibit

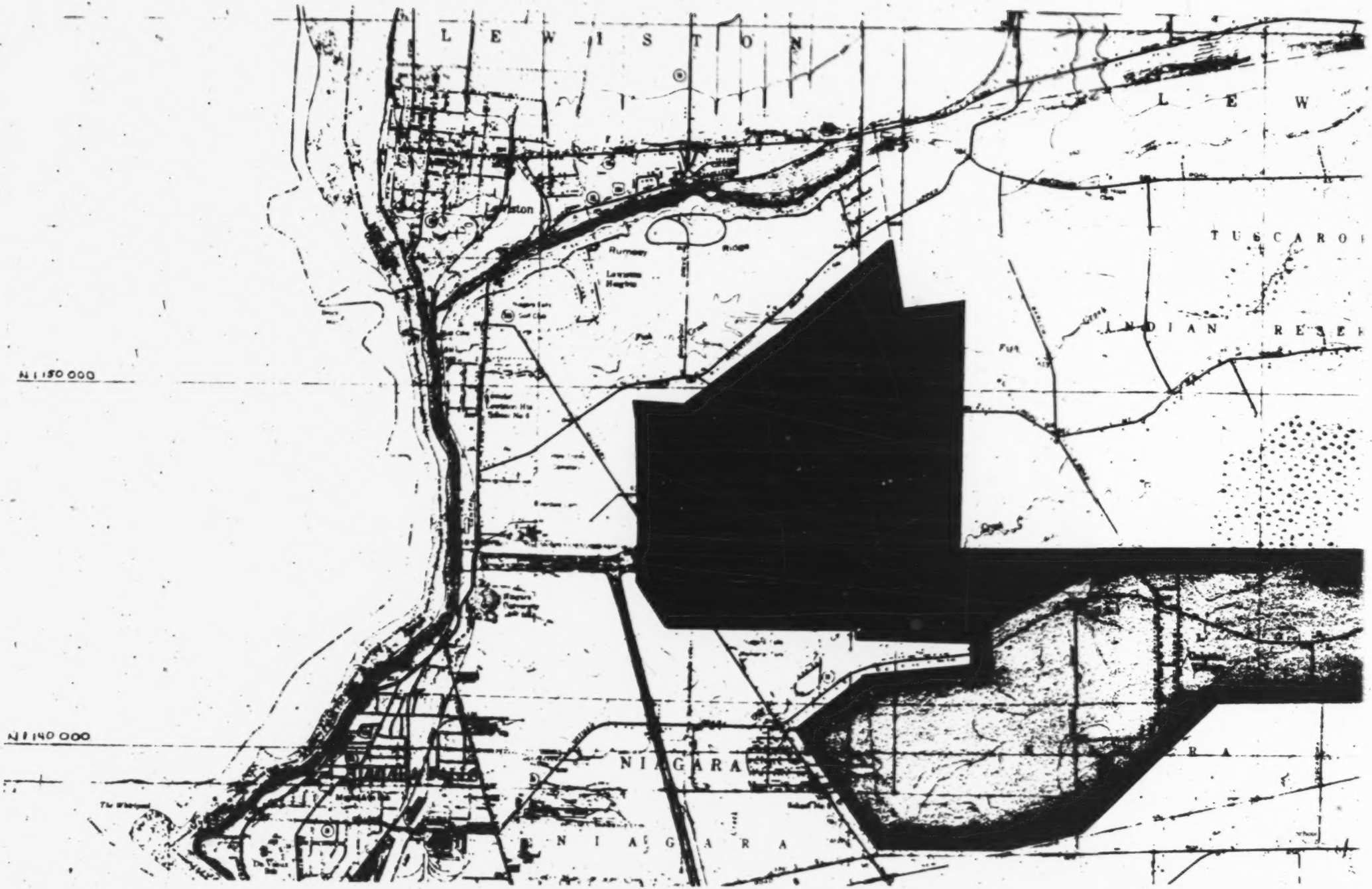

L E W I S T O N
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TUSCARO
INDIAN RESE
N I A G A R A
N I A G A R A
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N 1 140 000

Exhibit 162



Exhibit 16

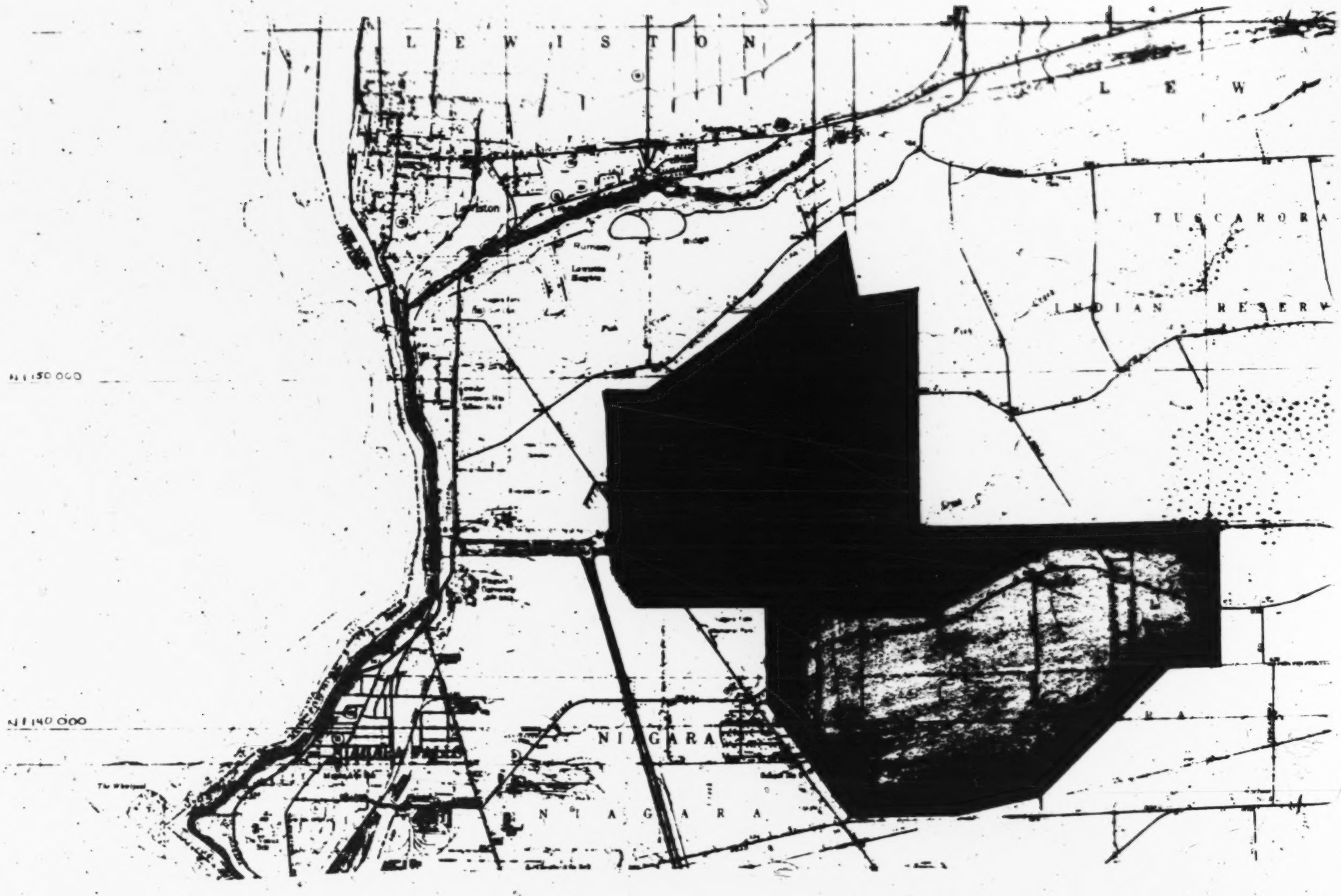
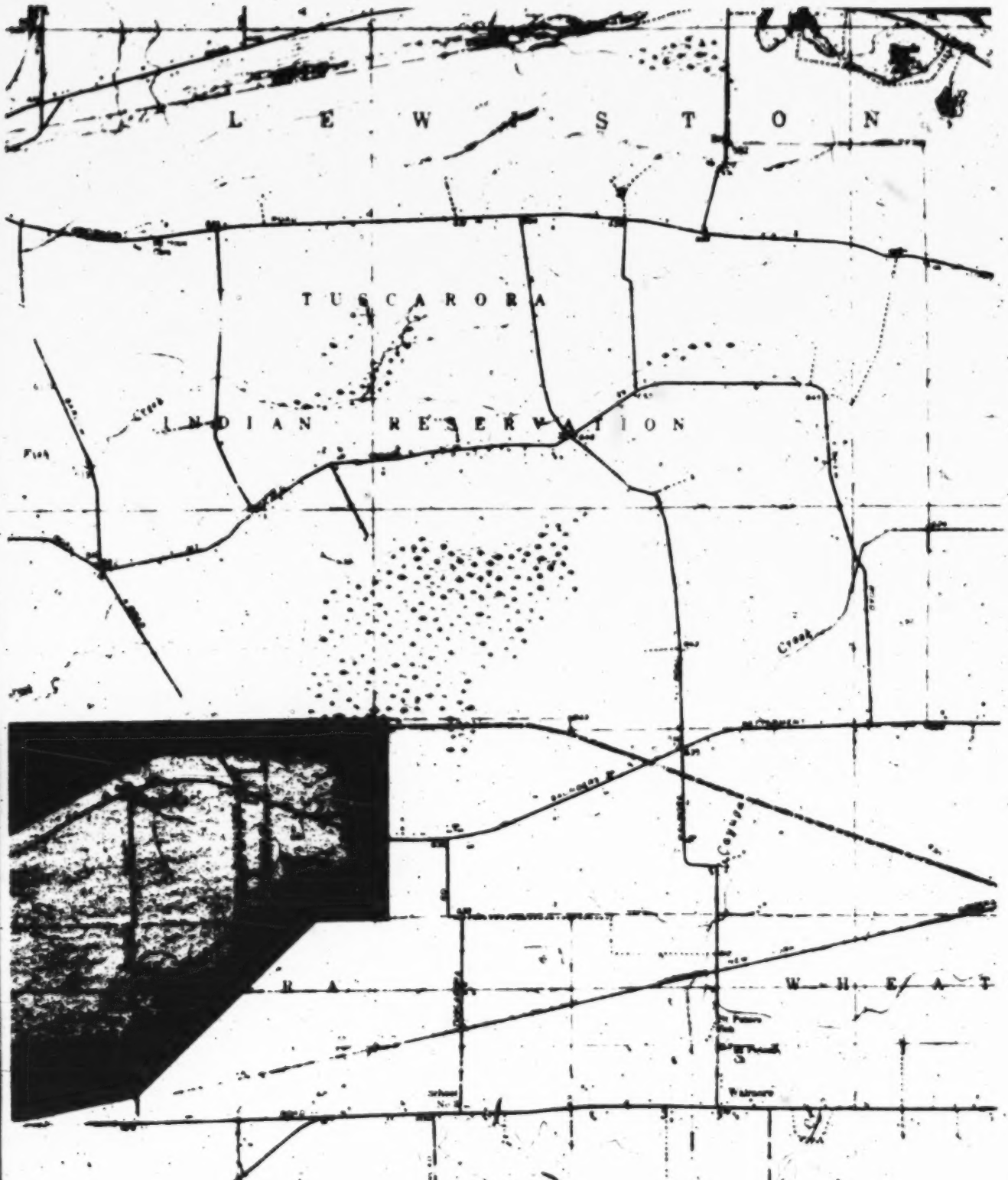

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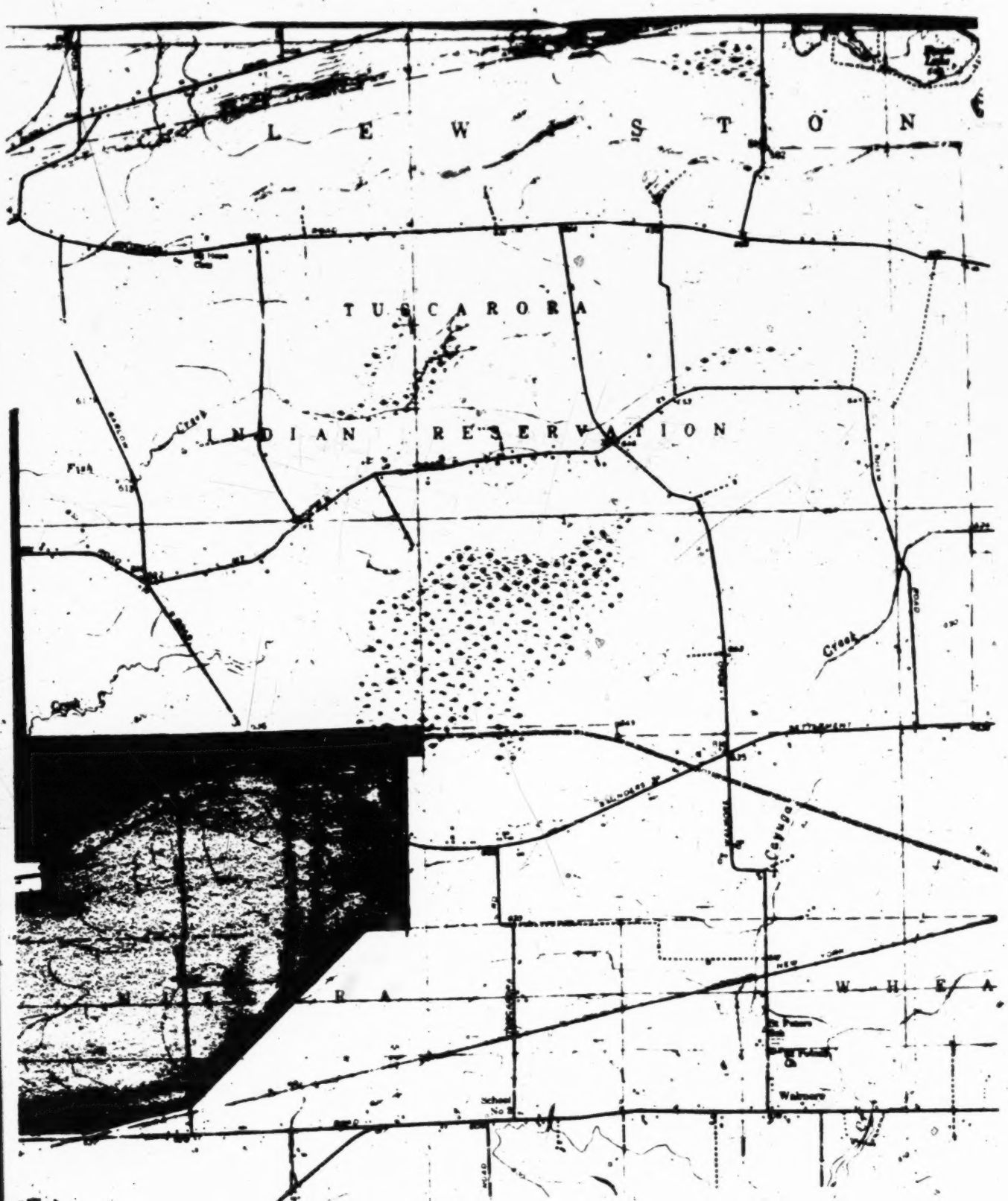
Exhibit 163 7751



Exhibi


L E W I S T O N
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N 1150 000
N 1140 000

Exhibit 164 7752



Exhi


L E W I S T O N
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Lewiston
Rumsey
Ridge
Lewiston Heights
Fish
Creek
T U S C A R
I N D I A N R E S
N I A G A R A
N I A G A R A
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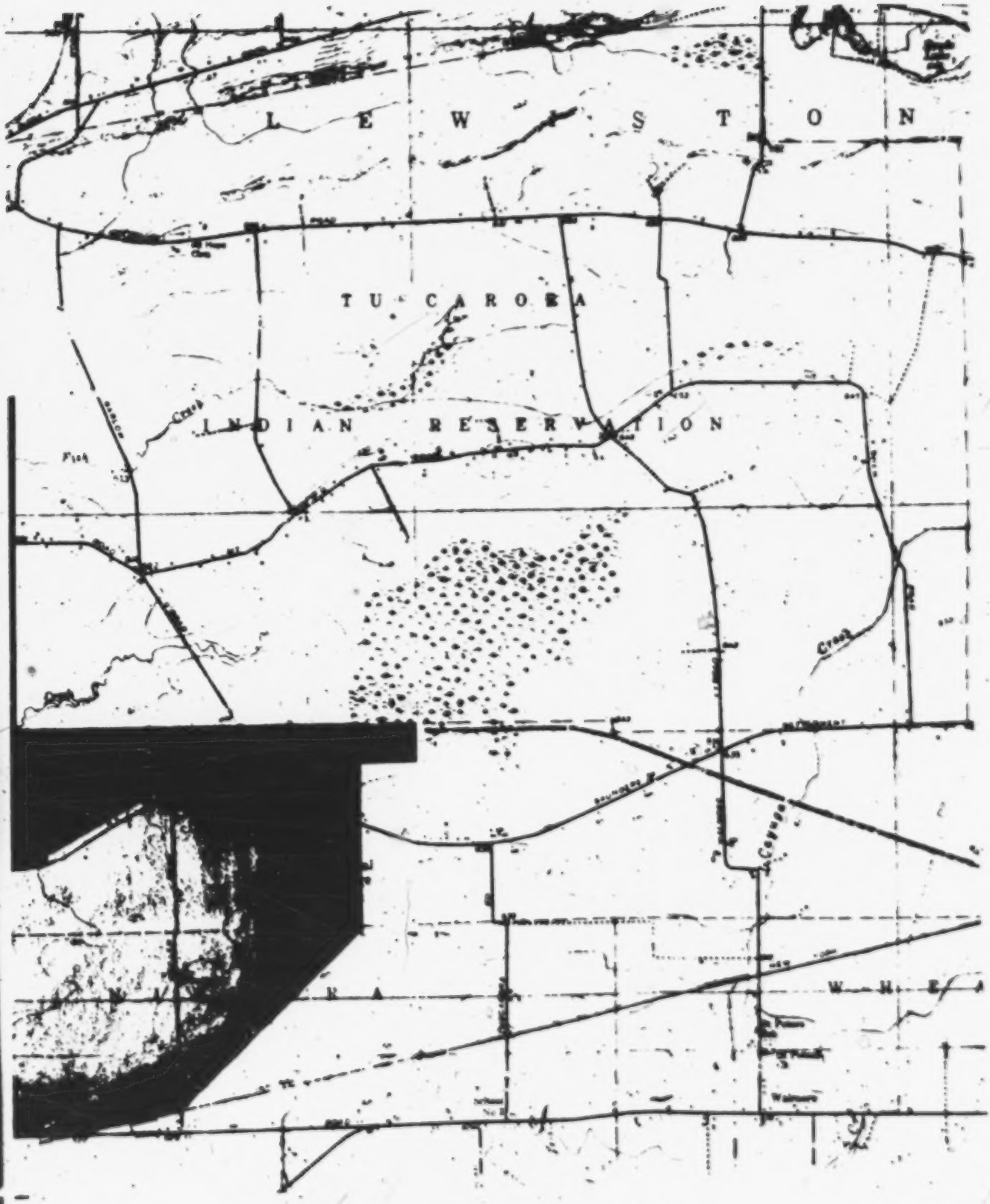

L E W S T O N
T U S C A R O R A
I N D I A N R E S E R V A T I O N

Exhibit 167 7733

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of	)	
	)	
Power Authority of the State of New York	)	Project No. 2216
	)	

ORDER APPROVING PROJECT EXHIBIT

(Issued May 5, 1958)

On May 1, 1958, in compliance with Article 33 of its license for major Project No. 2216, Power Authority of the State of New York filed for Commission approval and inclusion in the license the following described project exhibit:

Exhibit J (FPC No. 2216-32) entitled "General Map - Niagara Power Project".

The Exhibit J drawing is a general map of the entire project area, showing the location of the project works authorized by the license for Project No. 2216.

The Commission finds:

The above-described Exhibit J drawing conforms to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) The above-described Exhibit J drawing is approved as part of the license for Project No. 2216.

(B) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order.

By the Commission.

Joseph H. Gutride,
Secretary.

DC-17

Exhibit 181 7856

February 11, 1958

TO THE TUSCARORA INDIAN NATION:

For more than a year the Power Authority has been trying in good faith to negotiate with your Nation. We asked as a preliminary step to enter your lands and make surveys, which must be made before detailed plans for the Niagara Project can be drawn. We asked politely to be allowed to inspect the property, so that we can determine the fair value of the part which must be taken for the project. Without exception our friendly overtures have been arbitrarily rejected.

The Federal Power Commission has now issued a workable license for construction of the entire project. We have borrowed from private investors the first $100,000,000 of the $625,000,000 needed to build. Contracts for turbines and generators and for construction of the main generating plant have been issued. This essential work already unduly delayed can and must proceed immediately.

Obstructions in the way of the project have already caused unconscionable economic loss to the whole Frontier Community and to the entire Western part of the State. Absence of cheap power is aggravating the general business recession. Ten thousand construction jobs which will be provided when the project is fully under way are badly needed to offset rising unemployment. You yourselves have as much at stake as your neighbors, since the local industries where most of you are employed cannot survive much longer the economic difficulties resulting from increased power costs and uncertainties as to the completion of the project.

This project cannot be built and operated without a large storage reservoir. Without the reservoir most of the extra water made available by the new Niagara Treaty cannot be used efficiently. Engineering plans,

developed after long study and approved by the Federal Power Commission after exhaustive hearings, call for a reservoir of approximately 2600 acres, about 1000 acres of which will be in the Reservation area indicated on the accompanying map. Altogether we will have to take about 1200 acres of Tuscarora land for the reservoir and transmission lines. Over 5000 acres of the 6249 which you now have will remain. With your present population of about 650, there will still be 8 acres of land for each of you. Only about 15 houses are in the way. Much of your land is presently uncultivated and unused.

Sale of this land by you to us obviously will impose no hardship on your community. It is in fact a unique and unusual opportunity for cooperation. The money received can be of inestimable continuing benefit to you in the form of scholarships for your children and for community improvements, or used to acquire and develop other land.

If we took other land for the reservoir many more people would be forced to move. More roads would have to be relocated. The cost of land and construction for the reservoir would be enormously increased. Present plans would have to be scrapped. This alternative, therefore, is out of question.

For these reasons the Federal Power Commission —after listening patiently to all your spokesmen and after considering carefully the brief filed on your behalf—rejected your contention that no Indian land should be included in the reservoir.

You claim that the inclusion of any part of your reservation in the reservoir will be a violation of existing Treaties between the Tuscaroras and the United States. However, the Treaties you talk about have nothing to do with your reservation in Niagara County, as you must know.

The Power Authority is prepared to conclude negotiations on the generous terms herein outlined directly with your authorized representatives for the purchase of the land we require. We shall pay you for the land itself, for all the buildings on it, plus an additional amount to compensate you for any possible inconvenience which may be involved. While we have not been able fully to inspect the property, we estimate that the total payment we are prepared to pay for prompt settlement, considering the peculiar nature of Indian land, may be as much as $1,000 an acre not including houses of any value. It will be necessary in any event for us to bring condemnation proceedings, so that the court can approve a settlement and determine questions of title, but there is no reason why the court proceeding should not be entirely friendly and on an agreed basis.

It will be necessary in the very near future for our engineers to enter your property to survey and secure engineering data needed for detailed design and determination of precise property information, and also for the Authority's contractors to enter your property for construction purposes.

The Authority will take every reasonable precaution to avoid interference with the exercise of your long-established fishing rights along the shore of the Niagara River.

While we have understood your reluctance to part with land, we cannot delay longer. We are carrying out an urgent project of vital public importance under double mandate of State and Federal law, and in accordance with a Federal license. We have no more time for stalling and debate.

It is high time for expeditious negotiation if you are in a mood to negotiate. The advantages to your Nation of prompt, friendly agreement on the generous terms the Authority offers cannot be overstated. We hope you will decide to proceed in this spirit, but we must go ahead in any event.

Very truly yours,

Robert Moses

Chairman

Exhibit 186 7878

Niagara Falls Gazette, March 7, 1957, P. 19
Cols. 5 to 8

TUSCARORA COUNCILS UNANIMOUSLY REJECT SPA BID TO MAKE SURVEY ON RESERVATION

By Dick Utts

Gazette Staff Reporter

TUSCARORA RESERVATION—Members of the Tuscarora General Council voted a flat "no" Wednesday night to a request by the State Power Authority to make a topographic survey on the reservation.

The Chiefs Council followed suit with a unanimous "no" vote by the five chiefs present led by Chief Elton Green.

Voting followed a request made for permission to make the survey by William H. Latham, resident engineer for SPA. The vote was unanimous by some 40 tribal members attending the meeting called at the Tuscarora Gymnasium, Mt. Hope Rd., by Hamilton Mt. Pleasant, chairman.

Not Trying to Buy Land

Mr. Latham said the survey was merely to determine the depth of the soil down to bed rock and would not interfere with people living on the small reservation. He said he was not at the meeting to negotiate the sale of land on the reserve.

"Would you buy land on the reservation?" a member asked.

Mr. Latham replied "yes, when and if we needed it." However, he explained that the power authority has not bought any land in this area yet. The SPA is now in the process of making surveys to determine just how to build a water storage reservoir most economically for power purposes.

Encroachments Feared

"We're not concerned about economics. We're concerned about having a place to live without encroachments," said Mrs. Harriet Pembleton, Mt. Hope Rd., who seconded the motion to turn down the request.

"Our reservation is only three miles long and two miles wide and there are 500 of us living here. Too many of our families' lands are being jeopardized now," the elderly tribal mother said. "There is enough white man's land to the other side of us for your use," she added.

William Rickard, whose motion squelched the SPA request said, "this proposition comes under civil jurisdiction. They can take the land over our opposition if they want it."

Treaty Protection Cited

Chief Green, however, asserted that the reservation land cannot be sold without breaking treaties with U. S. Government and the Six Nations Confederacy. "If it was not for these treaties we would not have the land we hold now. We are lucky to have it and appreciate the protective treaties.

"Now they want to make a survey," he continued. "From the survey they'll make a blue print. The next step is to acquire the land you don't survey anything for nothing."

The chief, who said he spoke in English rather than tribal language for the sake of the young folk declared:

"My answer to the request is a point blank no."

Mr. Latham and two associates left shortly after the voting but said he sympathized with the Tûscaroras' views. "We won't press the subject any further this evening," he concluded.

June 187

[redacted]A Cites Power Lack In Drafting Falls Bill

Loss Caused By Schoellkopf Collapse Noted

An acute shortage of electrical energy in Western New York, due to the Schoellkopf plant disaster last June 7, is cited by the New York State Power authority as one of the reasons Congress should pass a bill authorizing the authority to develop Niagara power.

In its official report to Governor Averell Harriman, the authority presents a "Draft of Legislation—A Bill" which is believed to be substantially the proposed legislation agreed on at a conference in Washington among SPA officials, representatives of Niagara Mohawk Power Corp. and state representatives in Congress.

The proposed legislation was prepared under the direction of Authority Chairman Robert Moses. It is backed by the GOP authority trustee, John E. Burton and Wilkinson, authority vice chairman.

Point Out Bill

The two Democratic members of the authority, former Gov. [redacted] Pecor and A. Thomas [redacted], recently were quoted as saying they objected to the enactment of the bill.

In the draft, the authority states that Niagara Falls industries would be forced to curtail their operations drastically . . . were it not that they are able to receive remaining power at high cost on a temporary basis from the generators of Niagara at the Ontario Hydro-Electric Commission . . .

Ontario not only is using its share of the water presently under the 1950 treaty, but also a large part of the U.S. share as well, the authority states in the draft of legislation.

The bill, as outlined by the authority, provides for the allocation of approximately 450,000 kilowatts of power to Niagara. Niagara is given for the valley's share to about 32,500 cubic feet of water a second.

The rest of the proposed bill, reported from the report, follows:

DRAFT OF NIAGARA LEGISLATION—A BILL

To authorize the construction . . .

guarded on the Canadian side and to construct a weir, dive and park on the American side of the Niagara River near Niagara Falls pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission.

C. A provision requiring the licensee to contract, with the approval of the governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Project 16 for a period ending on the final maturity date of bonds initially issued to finance the project works herein specifically authorized, 445,000 kilowatts of power, which is equivalent to the amount produced by Project 16 prior to June 7, 1956, for the same general purposes for which power from Project 16 was utilized and in order to restore as nearly as possible low industrial power costs; provided the licensee of Project 16 consents to the surrender of its license at the completion of the construction of such project works, upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following:

Claim To Be Dropped

1.—The licensee of Project 16 shall waive and release any claim for compensation or damages from Power Authority of the State of New York or the State of New York except for compensation for tangible property and rights of way actually taken.

2.—Without limiting the generality of the foregoing, the licensee of Project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise. (d)



AUTHORITY'S REVISED NIAGARA PLAN—The State Power Authority's revised plan for harnessing the Niagara River to produce 2,000,000 kilowatts of electrical energy was unveiled today in the authority's annual report to the governor. As the map above indicates, the plan calls for twin covered conduits within the city limits to carry water to the Lewiston plant. It also provides for an open cut canal between the north city line and the plant. Other new features are proposed city playgrounds and an addition to Hyde Park. The plan links a Niagara Parkway from the North Grand Island Bridge to Ft. Niagara with power development. Cost of the project is estimated in excess of $566,000,000.

Use of Canal in Open Country to Save $105 Million on Project, SPA States

The New York State Power Au[thority] bring the water from Cassars to the north city line and the Lewis[ton] ... that it can save [mon]ey by the north city line, instead ... the plant

End of Heavy Seaway Work Forecast in '57

Completion of heavy construction work on the St Lawrence ... by major operations by the end ...

"Men From Mars" Pay Visit to Cub Pack

Akela and "Men from Mars" left and chart showing star[s] ... visited Cub Pack No. ... at its meeting monthly meeting at St. Paul's ... Den No. 2 and 3 presented Methodist Church ... skit and presented awards ...

In an impressive candlelight ... gained Den No. 1 and its Den ... ceremony Akela welcomed new ... mother Mrs. Fred Lester.

Bobcats David Wright James Mas[on] ... Final arrangements were made ... annual Blue and Gold ...

...ed appointment 495,000 kilowatts of power to Niagara, Mohawk is given for the utility's rights to divert 32,500 cubic feet of water a second.

The text of the proposed bill, reprinted from the report, follows:

DRAFT OF NIAGARA LEGISLATION—A BILL.

To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

...enacted by the Senate and ... of Representatives of the United States of America in Congress assembled: That it is hereby declared that an emergency exists in the western part of New York ... as a result of a coal ... which began June 3, 1946, ... of the Secretary of ... the Bureau of Federal Power ... Project 16 for the generation of power by the use of waters of the Niagara River, ... is hereby ...

This power was largely used by ... and ... industries vital to the defense of the United States and employing a large proportion of all workers resident in the vicinity. These industries would be forced to curtail their operations drastically or abandon them at a cost of tens of thousands of jobs unless it was then they were able to purchase necessary power at high cost on a temporary basis from the operating facilities of the Hydro-Electric Power Commission of Ontario which is using not only Canada's share of the water permitted under the 1950 Treaty between the United States and Canada, but also a large part of the United States' share of such waters.

The diversion of Project 16 is entitled to use 19,725 cubic feet per second of the United States' share of the waters until 1971 and (b) use a further 12,775 cubic feet per second of the commission. By the use of this total of 32,500 cubic feet of water the diversion of Project 16 annually produced approximately four billion kilowatt hours of energy.

Would Build Plant

A modern hydro-electric plant proposed to be constructed by the Power Authority of the State of New York to take advantage of the entire drop of the river can produce about the same amount of power by the use of 19,725 feet of such water.

By the use of this water and of the additional water permitted to be used under the 1950 treaty, approximately thirteen billion kilowatt-hours annually of urgently needed power can be produced by the project. It is, therefore, imperative that the works to produce such power be constructed without further delay.

Sec. 2. The Federal Power Commission is hereby expressly authorized and directed to issue a license pursuant to the Federal Power Act to Power Authority of the State of New York for a power project with capacity to utilize all of the United States' share of the waters of the Niagara River per...

...thereto, subject to the provisions of this Act and the following conditions:

1.—That the project shall be effected, maintained and operated as a unit of the improvement of navigation in the Niagara River and in connection therewith the licensee shall comply with such reasonable regulations as the Secretary of the Army may prescribe in the interest of navigation, including the control of the level of the waters of the Niagara River and the flow through the project works, and shall make such provision as may be ordered by the Secretary of the Army for the passage of navigation through or around the project works.

2.—That before beginning the generating of the foregoing, the licensee of Project 16 shall receive all claims for compensation or damages based upon loss of or damage to riparian rights, diversionary rights or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise, (d) a provision giving ...ment of the United States a preference to purchase power, (e) a provision requiring a reasonable amount of power to be made available within the economic market area or neighboring states, (f) a provision ...ring that a reasonable amount ... power available in New ... of the power made available ... the neighboring states ... paragraph (e) to be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the economic market area.

Sec. 4. This act may be cited as the "Niagara Development Act of 1957."

Great Lakes Origin Was 13,000 Years Ago

GRAND RAPIDS, Mich. (AP)—The Great Lakes began forming about 12,000 to 13,000 years ago as the last great glacier receded northward, according to a University of Michigan scientist.

Dr. James B. Griffin, an archeologist, said radioactive carbon tests of prehistoric bones and relics were used to fix the age of the lakes.

"Some radiocarbon dates don't fit, but most of those for the Great Lakes area do," Griffin added.

Radiocarbon tests give the same dates for geological and archeological events which are known to have happened at the same time in Michigan and the Rocky Mountains, Griffin said.

House Hit by Fire

GRAND ISLAND — Volunteer firemen were called out Sunday night to a new house on Stony Point Rd. where a salamander flared up and scorched walls and ceiling of a room.

Firemen said that the salamander was being used to prevent water pipes from freezing, and added that damage to the house appeared slight.

Strager's Son To Be Released From Hospital

The five year old son of a city councilman was scheduled to be released from Mt. St. Mary's Hospital this afternoon after spending two days there as the result of his eating a poisonous capsule of plant food.

...ority's annual report to the governor. As the map ... bring the water from Conners Island to the north city line, according to SPA plans prepared by Uhl, Hall and Rich, an engineering consulting firm.

The report notes that "opposition to open channel construction for reasons of safety do not appear warranted" in the stretch between the north city line and the Lewiston plant.

The potential danger in this area, according to the report, is "the greater than at the pumped storage reservoir" which would be located in Lewiston east of Military road.

"Both the reservoir and open channel are in open country and the required safety protections can be applied effectively in either situation," it is asserted in the report.

This $100 million plus saving in construction cost is possible, the SPA claims, because of a difference in costs between tunnel rock excavation and rock excavation in open cut.

The authority estimates that $15 a cubic yard for tunnel rock construction is a "conservative maximum" while excavation in open cut would cost only $2.25 a cubic yard.

Use of Canal in Open Country to Save $105 Million on Project, SPA States

The New York State Power Authority estimates that it can save $105,318,000 on the Niagara power project by using an open canal to carry water from the north Niagara Falls city line to the power plant forebay in Lewiston.

This estimate is contained in its annual report to the governor.

Two covered conduits would ... Other new features are proposed city ...

Power Plant Structures Will Cost $143,800,000

The biggest single item of expense for a state power project at Niagara Falls will be $143,800,000 for power plant structures, according to studies made here by Uhl, Hall and Rich, general engineering consultants to the State Power Authority.

Overall cost of the project, the authority estimates, will be $360,974,125.

A breakdown of costs is listed in the annual report of the authority to Gov. Averell Harriman, which was made public today.

The total cost includes 13 million dollars for a Niagara Parkway from the North Grand Island Bridge to Ft. Niagara and $7,500,000 for remedial works in the upper river to preserve the beauty of the falls. These works, undertaken jointly by the United States and Canada, are nearing completion.

The sum for power plant structure includes miscellaneous power plant equipment, such as cranes.

Here are the other SPA Niagara project estimates:

$138,020,000 for reservoirs, embankments and waterways.

$94,500,000 for turbines and generators.

$14,300,000 for accessory electric equipment, including a switchyard in Lewiston.

$12,100,000 for land acquisition and relocation of facilities.

$106,305,000 for engineering and contingencies.

$30,549,125 for interest during construction.

Power Engineer a Will Initiate 10

Electric City Chapter No. 17, National Association of Power Engineers, will initiate 10 new members during a meeting at the Juniata Club tomorrow.

Following the initiation ceremonies, members will be shown sports movies and a film titled, "General Electric Lighting." Erwin Hurmen is chairman of the event.

What husbands don't know about sex

Woman Hurt In Collision

Mrs. Doris C. Morton, 42, of 920 Depot Ave., received a leg laceration when a car in which she was riding became involved in a collision with another car at 18th St. and Niagara Ave. last evening. She did not require hospital treatment.

Police said she was riding in a car driven by John F. Moshier, 40, of the Depot Ave. address.

The operator of the other car was identified as Harry J. Bouteiller, 21, of 1636 Highland Ave.

GOP Club Entertains Two Charter Members

The Power City Women's Republican Club held its monthly executive meeting at the home of the president, Mrs. William Roy, of a "Hawaiian Night," honoring mood, Jefferson Ave., in the form two charter members who will leave shortly for a month's stay in the Hawaiian Islands, Mrs. Ralph Jackson and Mrs. Albert Wood.

The hostesses were Mrs. Raymond and Mrs. Earl Heiman.

A pot luck supper was planned for Feb. 13 with Mrs. Rosemary Meloee and Mrs. Pearl Hilts as co-chairmen. Each member may bring a guest and reservations may be made through Mrs. Ernest Sylva.

Engineer's Daughter Dies at Age of 16

Linda Rose Simpkins, 16, daughter of Edward E. Simpkins, chief engineer at Stella Niagara Sewage, and the late Rose Gallozzi Simpkins, died Saturday (Jan. 26, 1957) at a Newark Children's School where she had been for the last 13 years.

Surviving besides her father are two sisters, Mary Margaret and Lori Ann Simpkins, both of this city.

Private funeral services will be held tomorrow at the Grubby Funeral Home and burial will be in Gate of Heaven Cemetery at the convenience of the family.

Jacket Is Stolen

NORTH TONAWANDA — A black leather motorcycle jacket was reported stolen from the Al Schwartz Clothing Store, 80 Webster St., Saturday afternoon.

A BETTER FUNERAL SERVICE WHETHER YOU PLAN TO SPEND $200 OR MORE

Cornell & Doggett
Funeral Chapel, 1917 Main

Who borrows from HFC?



Over two million Americans like you borrow from HFC each year. HFC is America's oldest and largest consumer finance

End of Heavy Seaway Work Forecast in '57

Completion of heavy construction work on the St. Lawrence River power project by the end of 1957 is forecast by the New York State Power Authority in its annual report.

Another goal cited was the opening of the St. Lawrence River between Montreal and Lake Ontario to 27-foot draft vessels at the start of the 1959 navigation season.

Authority Chairman Robert Moses said progress on the vast project is proceeding on schedule. The report covered the authority's activities since June 1954 when the U. S. Supreme Court cleared the way for the joint project with Ontario.

"If progress in 1957 is at substantially the 1956 rate," Moses said, "we shall be able to report at the end of 1957 that the bulk of the heavy construction has been completed."

Overall completion of the multi-million-dollar project is scheduled for 1959.

Man Discharges Gun In Restaurant Here

Police today said they were investigating a report about an unidentified man discharging a gun inside Pete's Restaurant, 2800 Highland Ave., Saturday night. There was no report of any injury. No other details were mentioned in the police report of the incident.

"Men From Mars" Pay Visit to Cub Pack

Akela and "Men from Mars" ... named Cub Pack No. 7 at its ... monthly meeting at St. Paul's ... Methodist Church.

In an impressive candlelight ceremony Akela welcomed new Bobcats David Wright, James Mar... and David Fox and presented awards to the following: Timothy Beach, Richard Tucker, Jack Woodward and Keith Williams.

The display table, based on the theme "Eyes on the Sky" was filled with space helmets, telescopes and airplanes as well as stamps, books ...

Dens Nos. 2, 3 and 4 presented skits and welcomed new organized Den No. 1 and its Den mother Mrs. Fred Lester.

Final arrangements were made for the annual Blue and Gold dinner which will be held Feb. 21 at 6 p.m. in the community hall of the church.

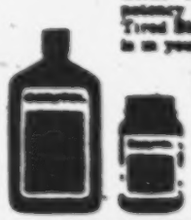
North America's only known diamond mine is located in Arkansas.

After a cold, flu, sore throat, virus you may feel run-down from

TIRED BLOOD*

Feel Stronger Fast

within 7 days—or money back!



After a cold, flu, sore throat or virus you may suffer iron deficiency anemia*... or, as we call it, Tired Blood. To feel stronger fast take GERITOL, the high-potency tonic that begins to strengthen iron-poor Tired Blood in 24 hours. In just one day GERITOL iron is in your bloodstream carrying strength and energy to every part of your body. So, after a winter illness, if Tired Blood is your problem—take GERITOL every day. Take either the liquid or the tablets. You'll feel stronger fast within seven days or your money back.

SAVE $1.00—Buy Economy Size!

GERITOL

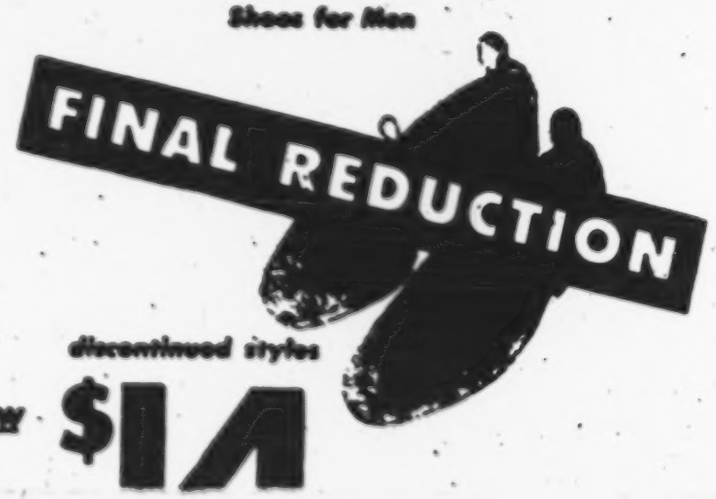
SINGER REXALL DRUGS

2006 MAIN — 123 FALLS

last few days!

Florsheim

Shoes for Men



discontinued styles

now $1

...capacity of southern Canada as a ...cost of tens of thousands of jobs ...ere it not that they are able to ...nsfer necessary power at high ...cost on a temporary basis from the ...operating facilities of the Hydro-...Electric Power Commission of On...tario which is using just only Can...ada's share of the water permit...ted under the 1950 Treaty be...tween the United States and Can...ada, but also a large part of the ...United States' share of such water.

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World Bulid Plant

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Sec. 2. The Federal Power Com...mission is hereby expressly auth...orized and directed to issue a ...license pursuant to the Federal ...Power Act to Power Authority of ...the State of New York for a power ...project with capacity to utilize all ...of the United States' share of the ...waters of the Niagara River per...mitted by international agreement.

Sec. 3. The Federal Power Com...mission shall include among the ...licensing condition

A. A provision requiring the ...licensee to reimburse the United ...States for its share of the cost of ...construction of remedial works, in...cluding engineering and economic ...investigations, undertaken in ac...cordance with Article II of the ...1950 Treaty.

Parks, Rides Sought

B. A provision requiring the ...licensee, as a part of the cost of ...the project, and in connection with ...the taking of the State of New ...York's share of the development ...of power to protect the scenic val...ues of the American side of the ...falls in a manner similar to that ...which they have been safe-

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Scheduled for release was Peter Strager, son of Council...man and Mrs. George P. Strager.

He was rushed to the hospital Saturday night after swallowing a capsule of sodium selenate. At the hospital, physicians pumped out his stomach, then admitted him for observation.

Strager said a younger son, Johny, 3, climbed up to the top shelf of a kitchen closet and took the capsule. After being unable to bite into it himself, he gave it to his brother, thinking it was candy.

Mrs. Strager found the con...tainer open and, after question...ing the younger boy, discovered what had happened. She called police, who took the child to the hospital.

874,123.

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Power Engineer a Will Initiate 10

Electric City Chapter No. 17, National Association of Power Engineers, will initiate 10 new members during a meeting at the Juniata Club tomorrow.

Following the initiation ceremo...ny, members will be shown sports movies and a film titled, "General Electric Lighting." Erwin Hurmence is chairman of the event.

What husbands don't know about sex

To wives, tenderness, as dis...tinct from passion, is as impor...tant a part of making love as the sex act itself, says the emi...nent physician and marriage counselor, Dr. Abraham Stone.

In February Reader's Digest bespeaks frankly about the hus...band's role in marriage, reveals aspects of woman's nature that many men may not appreciate.

Get February Reader's Di...gest at newsstands today: 28 ar...ticles of lasting interest, includ...ing the best from leading maga...zines, newspapers and books, condensed to save your time.

Vv Uuiuin Ladies In Collision

Mrs. Doris C. Meehan, 42, of 920 Depot Ave., received a leg lac...eration when a car in which she was riding became involved in a collision with another car at 10th St. and Niagara Ave. last evening. She did not require hospital treat...ment.

Police said she was riding in a car driven by John F. Meehan, 48, of the Depot Ave address.

The operator of the other car was identified as Harry J. Bouvilier, 21, of 1636 Highland Ave.

GOP Club Entertains Two Charter Members

The Power City Women's Re...publican Club held its monthly executive meeting at the home of the president, Mrs. William Roy, of a "Hawaiian Night," honoring mood, Jefferson Ave., in the form two charter members who will leave shortly for a month's stay in the Hawaiian Islands, Mrs. Ralph Jackson and Mrs. Albert Wood.

The hostesses were Mrs. Ray...mond and Mrs. Earl Heiman.

A pot luck supper was planned for Feb. 13 with Mrs. Rosemary Melose and Mrs. Pearl Hilts as co-chairmen. Each member may bring a guest and reservations may be made through Mrs. Ernest Sylva.

Engineer a Daughter

Dies at Age of 16

Linda Rose Simpkins, 16, daugh...ter of Edward E. Simpkins, chief engineer at Stella Niagara Sem...ary, and the late Rose Gallocchi Simpkins, died Saturday (Jan. 26, 1957) at a Newark Children's School where she had been for the last 13 years.

Surviving besides her father are two sisters, Mary Margaret and Lori Ann Simpkins, both of this city.

Private funeral services will be held tomorrow at the Grubley Fu...neral Home and burial will be in Gate of Heaven Cemetery at the convenience of the family.

Jacket Is Stolen

NORTH TONAWANDA — A black leather motorcycle jacket was reported stolen from the Al Schwartz Clothing Store, 80 Web...ster St., Saturday afternoon.

A BETTER FUNERAL SERVICE TOGETHER YOU PLAN TO SPEND $200 OR MORE

Cornell & Doggett
Funeral Chapel, 1817 Main

Who borrows from HFC?



Over two million Americans like you borrow from HFC each year. HFC is America's oldest and largest consumer finance company with 79 years' experi...ence in helping families solve their money problems. So if you need $20 to $600, visit HFC where you may always borrow with confidence.

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Loans made to residents of nearby towns

multi-million-dollar project is scheduled for 1958.

Man Discharges Gun In Restaurant Here

Police today said they were in...vestigating a report about an un...identified man discharging a gun inside Petty's Restaurant, 2800 Highland Ave., Saturday night. There was no report of any injury. No other details were mentioned in the police report of the incident.



Tired Blood in 24 hours, in just one day Geritol, iron in its finest hemoglobin carrying strength and energy to every part of your body. So, after a winter illness, if Tired Blood is your problem—take Geritol every day. Take either the liquid or the tablets. You'll feel stronger fast or within seven days or your money back.

SAVE $1.00—Buy Economy Size!

GERITOL

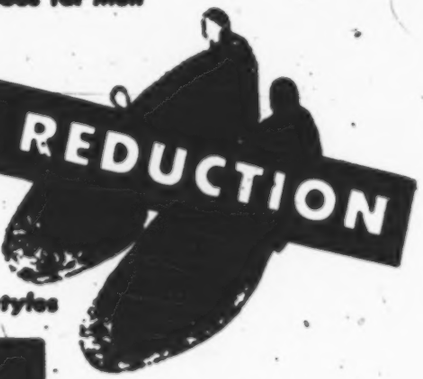
SINGER REXALL DRUGS

2006 MAIN — We Give S&H Green Stamps — 133 FALLS

last few days!

Florsheim

Shoes for Men



discontinued styles

now $14

regularly $18.95 to $24.95

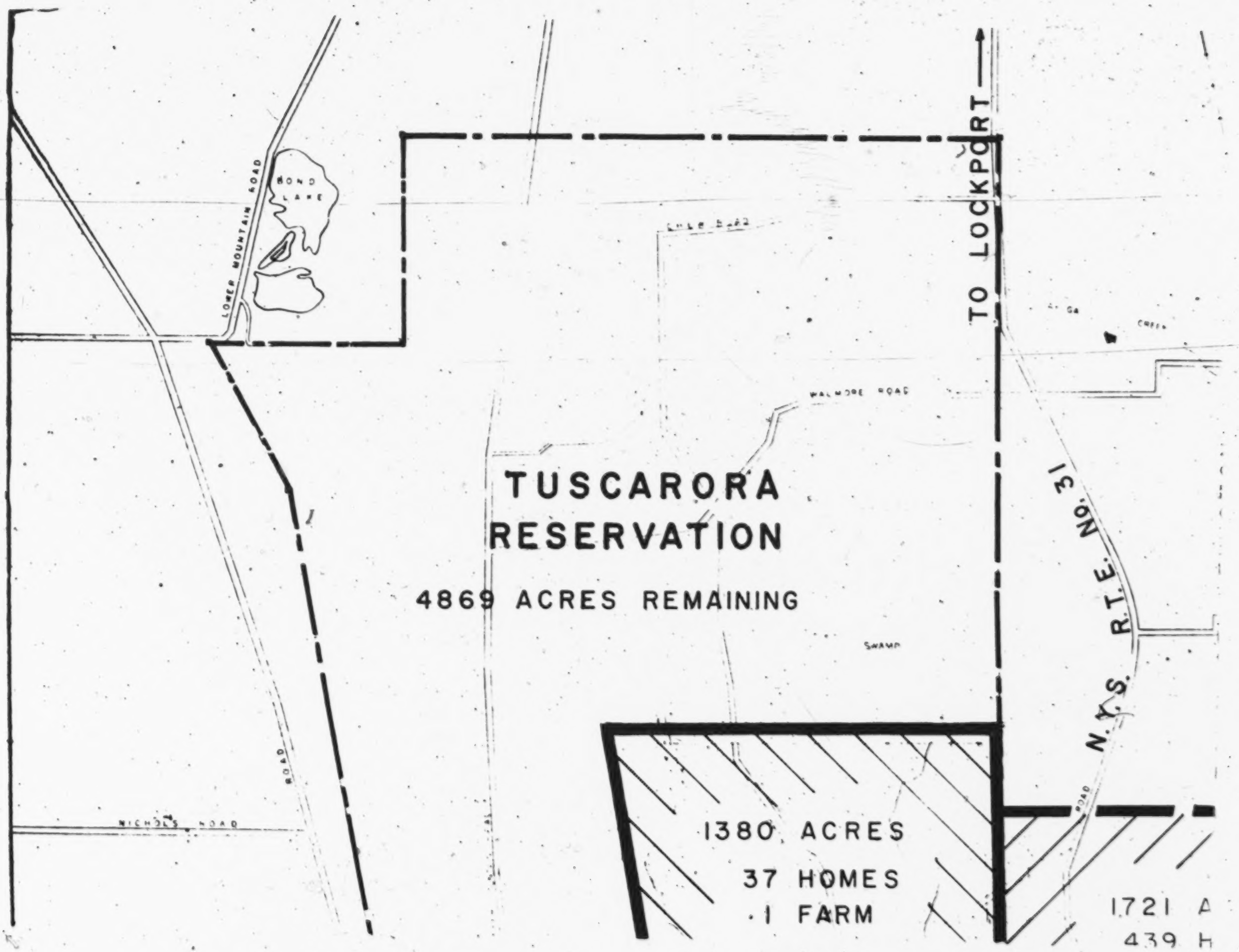
Don't wait another day—come in now for the best shoe buy in town! Odds and ends, broken sizes—but if we have your size you get a remarkable bargain!

SILBERBERGS

Famous for Quality for Over 100 Years

TUSCARORA RESERVATION

4869 ACRES REMAINING



S

NICHOLS ROAD

ROAD

LOWER MOUNTAIN ROAD

BOND LAKE

481

SWAMP

OAK

ES

ES

TO LOCKPORT

ROAD

N.Y.S. R.T.E. No. 31

CREEK

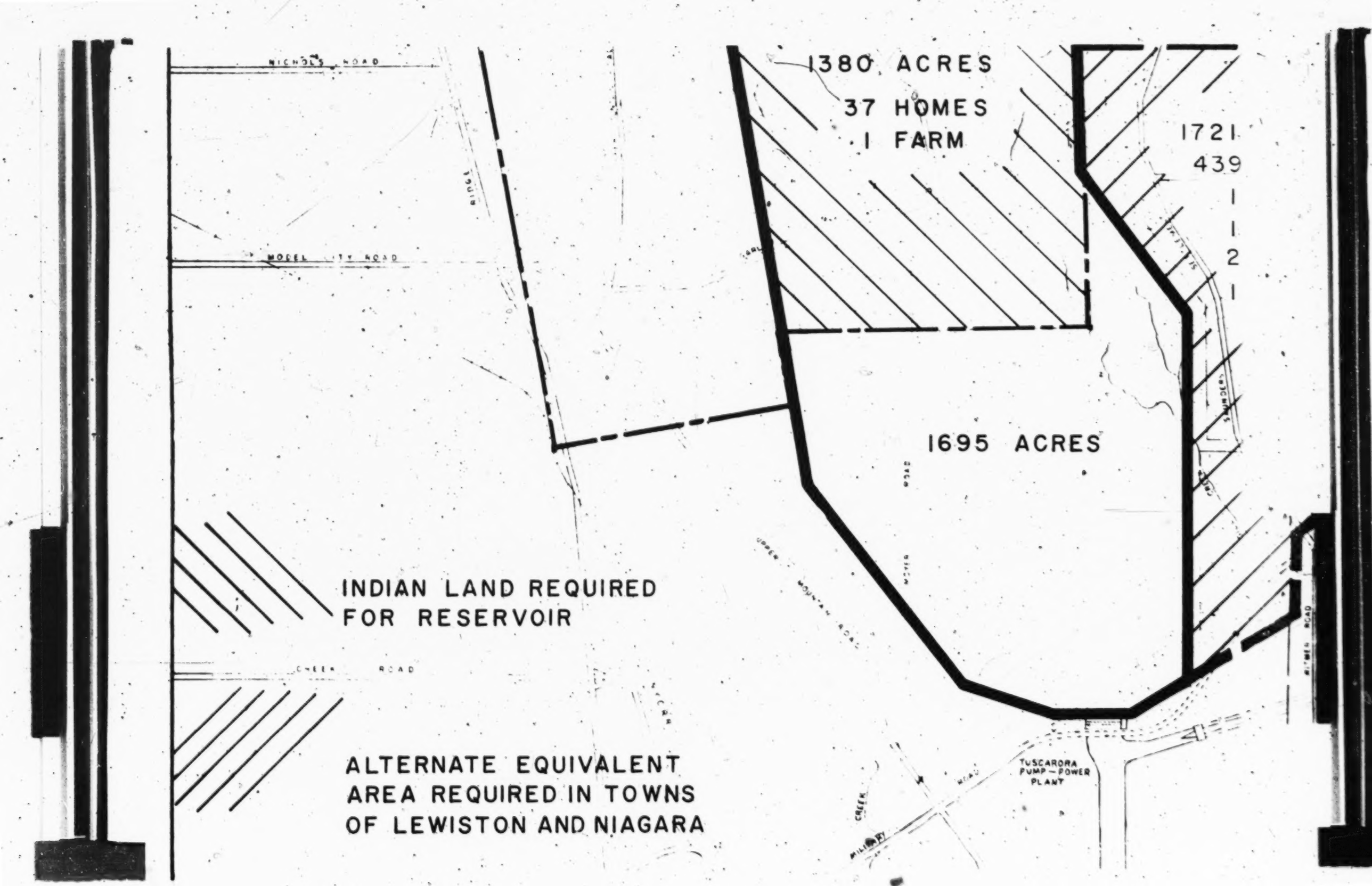
TOWN OF LEWISTON

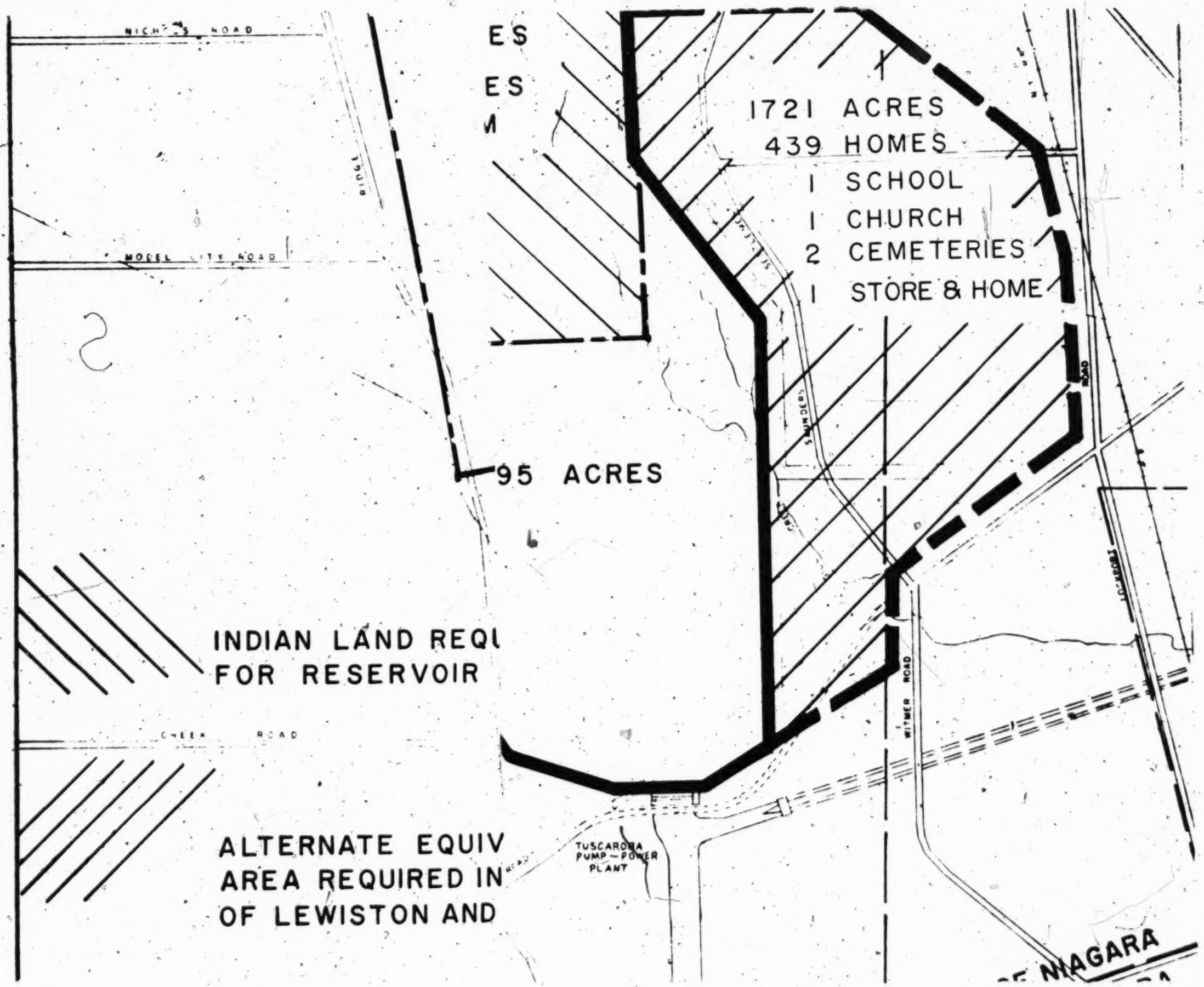
TOWN OF NIAGARA

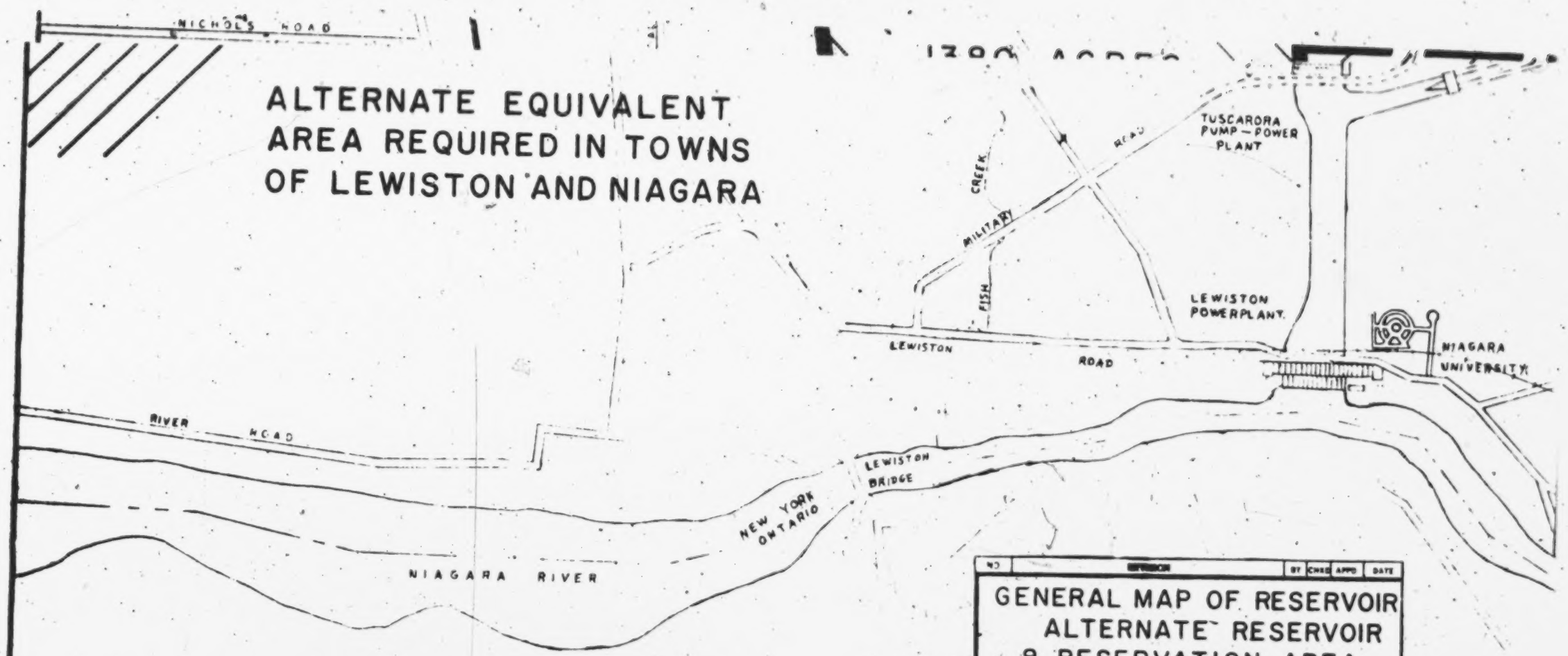
TUSCARORA ROAD

Exhibit 189

7882


1380 ACRES
37 HOMES
1 FARM
1721
439
1695 ACRES
INDIAN LAND REQUIRED
FOR RESERVOIR
ALTERNATE EQUIVALENT
AREA REQUIRED IN TOWNS
OF LEWISTON AND NIAGARA
TUSCARORA
PUMP — POWER
PLANT


NICHOLAS ROAD
MODEL CITY ROAD
RIDGE
ES
ES
M
1721 ACRES
439 HOMES
1 SCHOOL
1 CHURCH
2 CEMETERIES
1 STORE & HOME
95 ACRES
INDIAN LAND REQ
FOR RESERVOIR
CHEEK ROAD
ALTERNATE EQUIV
AREA REQUIRED IN
OF LEWISTON AND
TUSCARORA
PUMP—POWER
PLANT
WITMER ROAD
NIAGARA



NO	REVISION	BY	CHKD	APPD	DATE

GENERAL MAP OF RESERVOIR ALTERNATE RESERVOIR & RESERVATION AREA

NIAGARA POWER PROJECT
POWER AUTHORITY OF THE STATE OF NEW YORK

UHL HALL & RICH ENGINEERS BOSTON, MASS.

DRAWN	DESIGNED	RECOMMENDED	SCALE 1"=1000'
CHECKED			DATE
APPROVED			PA 7 FI-10-110 REV. 1

P E SEAL


NICHOLS ROAD
ALTERNATE EQUIVA
AREA REQUIRED IN T
OF LEWISTON AND NI
TUSCARORA PUMP — POWER PLANT
LEWISTON POWERPLANT
NIAGARA UNIVERSITY
TOWN OF NIAGARA
CITY OF NIAGARA FALLS
RIVER ROAD
NIAGARA RIVER
MAP OF RESERVOIR
RNATE RESERVOIR
ERVATION AREA
RA POWER PROJECT
ORITY OF THE STATE OF NEW YORK
RICH ENGINEERS
BOSTON, MASS.
PA 7 F1-10-1 REV. 1

[redacted]



Exhibit 190







Exhibit 191 7884

POWER AUTHORITY OF THE STATE OF NEW YORK

26TH ANNUAL REPORT

JANUARY 28, 1957



ST. LAWRENCE POWER DAM

LONG SAULT DAM

MOSES DAM

POWER PROGRESS

MASSENA INTAKE

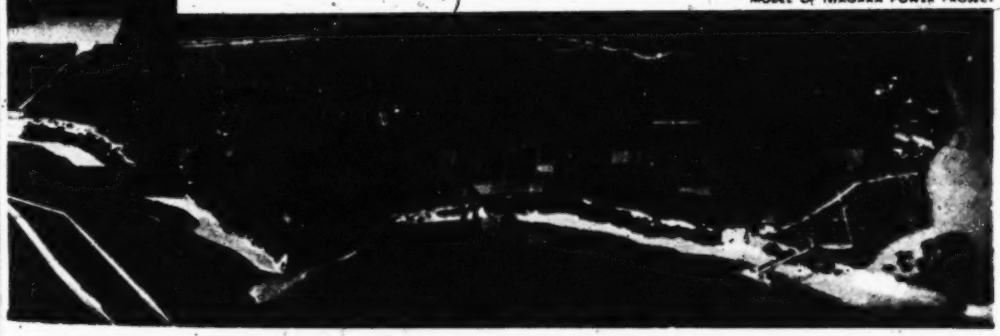
ST. LAWRENCE

CHANNEL IMPROVEMENT

NIAGARA

NIAGARA POWER PLANT

MODEL OF NIAGARA POWER PROJECT



January 28, 1957

To the Governor and Legislature of the State of New York:

The Power Authority of the State of New York herewith submits its Twenty-sixth Annual Report covering operations and transactions from June 1954 to December 31, 1956.

Respectfully,
ROBERT MOSES, Chairm

ANNUAL REPORT

St. Lawrence Construction

This report covers the period from June 1954 when the Supreme Court of the United States, by a decision in favor of the Authority, cleared the way for the start of construction of the St. Lawrence Project. Since then the project has been designed, financed and placed under contract. First stage construction on the Long Sault and Iroquois Dams is substantially completed, and the St. Lawrence River now flows through the finished sections, permitting the beginning of the second stages. The power dam has proceeded on schedule and work, including the equipment being manufactured in various plants throughout the country, is half completed.

Massena Intake is three-quarters completed and the Massena Canal will soon flow through the structure. Dredging has progressed in accordance with schedule and with prescribed methods of river regulation which protect upstream and downstream navigation and other interests. The halfway mark has also been reached in this work. Other work, including the relocation of highways, homes, utilities, reservoir clearing and reforestation of the entire area, is proceeding on schedule.

Our Canadian partners, Ontario Hydro, can also report similar progress on the Canadian side of the International Boundary. The Canadian part of the power dam is approaching 50% completion while work on the dikes, the diversion of the Cornwall Canal, the relocation of towns, the relocation of the Canadian National Railway and major highways, and dredging in the river, are on schedule.

Present plans provide for the flooding of the power pool on July 1, 1958 after which first power will be produced by September 1, 1958. The raising of the power pool will allow the Long Sault Canal, with the Eisenhower and Grass River locks, under construction by the United States Saint Lawrence Seaway Development Corporation, to be opened for 14 foot navigation. Up river the Canadian Saint Lawrence Seaway Authority is building locks bypassing the Iroquois Dam. This work is proceeding on schedule and will also be ready for navigation on July 1, 1958. The Seaway entities plan to have all facilities between Montreal and Lake Ontario ready for 27 foot draft ships at the beginning of the 1959 navigation season.

During the 1956 construction season we enjoyed reasonably stable labor conditions. In spite of shortages of critical materials, most deliveries were on time. We report with considerable pride that construction of this complicated international project is proceeding on schedule and costs are within the funds borrowed from our bondholders. If progress in 1957 is at substantially the 1956 rate, we shall be able to report at the end of 1957 that the bulk of the heavy construction work has been completed.

St. Lawrence Marketing

We have proceeded with the marketing of St. Lawrence power in an orderly fashion. Contracts have been signed with Alcoa, the State of Vermont, the City of Plattsburgh and the Plattsburgh Air Base. Contracts have been negotiated with Reynolds Metals Company and Niagara Mohawk Power Corporation, thus assuring a market for all St. Lawrence power and sufficient revenue to pay for maintenance, operation, interest and amortization of the bond issue. We have worked diligently to market our power in accordance with our law, our license and our contract with our bondholders. We have set aside sufficient power to take care of the foreseeable needs of all the municipal systems, rural electric cooperatives and other small distributors within the economic marketing area which has been established as that generally within 150 miles of the power project. This conclusion that the marketing area established by the Authority is reasonable and practicable was recently confirmed after an independent engineering study, when the States of Massachusetts and New Hampshire withdrew their appeal to the Federal Power Commission for St. Lawrence power.

Because additional water is available at Niagara during the non-tourist season, we plan to increase the St. Lawrence firm power by a physical tie between the St. Lawrence and Niagara transmission systems. This tie will also increase the firm power at Niagara during the tourist season.

St. Lawrence Transmission Lines

We have negotiated an agreement with the Niagara Mohawk Power Corporation and the New York State Electric and Gas Corporation whereby the Authority will build a 230,000 volt transmission line between Massena and Plattsburgh, and the two companies will furnish supplemental transmission facilities to insure the uninterrupted delivery of power to the State of Vermont, City of Plattsburgh and the Plattsburgh Air Base. Surveys and plans have been completed, a right of way acquired and the construction of the transmission line is now well under way. This work is being financed by a $7,250,000 bond issue floated during 1956 on favorable terms. The Massena-Taylorville Transmission Line rehabilitation is also proceeding on schedule and the line will be in first-class condition when power is generated in 1958.

Niagara

In 1956 the Schoellkopf plant, owned by Niagara Mohawk Power Corporation collapsed, creating an emergency shortage of power which is being temporarily alleviated by the importation of high cost power from Canada. Basic industries in the Niagara area, employing much of the local labor, will be forced to leave the Frontier unless low cost power can be restored within a reasonable time.

During 1956 the Authority, pursuant to the mandate in the Power Authority Act, assiduously pursued every available course to obtain a license from the Federal Power Commission to develop the Niagara project. When we failed to obtain legislation at the recent session of the 84th Congress, the Authority undertook to test the validity of the Senate reservation in the 1950 Treaty with Canada prohibiting development until Congress designates the construction agency, and applied directly to the Federal Power Commission for a license. The Federal Power Commission has rejected the application on the grounds that, because of the Treaty reservation, it lacks jurisdiction. The Authority is now proceeding in the Federal Courts to obtain a determination as to the legal effectiveness of the reservation.

In the meantime, the Authority has arranged for the introduction of legislation in the new Congress and everything possible will be done to obtain legislation which will lead to a license. We are also investigating the feasibility of removing the reservation by an exchange of notes by the two governments. The Authority is determined to pursue any and all avenues which may lead to the prompt granting of a license with the object of starting work during the first half of 1957. We have repeatedly pointed out that we will accept any workable bill, not inconsistent with the Authority Act, which will allow us to finance the project on reasonable terms and proceed promptly with construction. We have no interest in ideological or political differences and theories which apply more to other parts of the United States than to New York State. All we ask is the right to do at Niagara, what we are doing on the St. Lawrence—develop the power the State owns through the established State agency and by the use of private capital.

In order to reduce delay in starting construction of the Niagara project, Governor Harriman and the Legislative Leaders, by certificates of allocation and intent in October, 1956, made $350,000 available to the Authority for surveys, engineering studies, plans, hydraulic model tests and other activities. This work is well under way and the Authority will continue engineering design on an accelerated basis until a license is obtained, financing arranged and construction under way. These advances will be paid back to the State as soon as the project is financed.

Progress in Niagara engineering design is shown in this brochure together with reliable detailed estimates for the tunnels, conduits and canals between the Niagara River intake and the powerhouse at Lewiston. The cost of deep tunnels would be $204,185,000 while the cost of a combination cut and cover conduit through the City of Niagara Falls and an open canal north of the City would be only $98,867,000. It is obvious, on the basis of these figures, that the Authority cannot approve the use of deep tunnel construction, involving an additional $105,318,000 cost over and above the present project estimate of $566,071,125. The Authority has, therefore, adopted plans for a covered conduit within the City of Niagara Falls and an open canal beyond.

We propose to restore and enlarge Hyde Park, the grounds around the 39th Street school and provide a neighborhood playground in the vicinity of Canal and Streets. We also plan to return some of the property over the conduits to industrial, public and other uses. Every effort will be made to minimize any inconvenience caused by construction through the grounds of Niagara University. We shall consult with the University and arrange for full restoration and beautification of the construction area. These improvements are in addition to the previously announced program of enhancement and preservation of the Falls and the adjacent park lands, construction of Niagara Parkway and cooperation on arterial and grade crossing projects. The additional park, landscape and other improvement features of our plan referred to in this report are necessarily sketchy, preliminary and subject to conference and discussion with local agencies. These are not, however, empty promises and they will not be forgotten, subordinated or slighted.

Although there are comparatively few homes in the path of construction, considering the magnitude of the project, we shall carry on a relocation program designed to save the majority of these homes and will provide for the relocation of families in a decent, orderly manner.

Conclusion

We are grateful to the Governor and Legislative Leaders for their help and support in making available the first instance funds which will save many months' time in starting construction on the Niagara project. We are also indebted to various state departments, the Department of Public Works, Department of Law, State Comptroller and the Regional Park Commissions which have worked with us on St. Lawrence and Niagara land acquisition, arterial and park problems. We appreciate the cooperation of the International regulatory agencies and boards, the Seaway entities and the U. S. Corps of Engineers. We particularly wish to express our admiration and appreciation for the cooperation we have received from our partner, Ontario Hydro. Working under divers laws, customs and regulations, the St. Lawrence project would have become mired in technicalities had it not been for our good fortune in being teamed up with an agency with genuine enthusiasm for getting the job done expeditiously, honestly and well.

	ST. LAWRENCE (U. S. & Canada)	NIAGARA	
Watershed	298,080	263,440	Square Miles
Average annual flow without diversions	244,400	207,500	Cubic Feet per second
Period of record	1860-1954	1860-1954	
Head of the main plant (average)	81	314	Feet
Head for pumping at Niagara Reservoir plant	—	83	Feet
Head for generation at Niagara Reservoir plant	—	75	Feet
Dependable capacity	1,400,000	1,800,000	Kilowatts
Maximum capacity installed	1,880,000	2,190,000	Kilowatts
Annual energy output	13	13	Billion Kilowatt Hours
Primary annual energy output	10.4	10.7	Billion Kilowatt Hours
Number of units in main generating plant	32	13	
Capacity of each unit	57,000	150,000	Kilowatt
Number of units in pumping generating plant	—	12	
Capacity of each (pump) generating unit	—	20,000	Kilowatt
Estimate of cost	650	566	Million Dollars

Because of treaty requirements in connection with the flow of water over Niagara Falls during the summer tourist season, the St. Lawrence project can be of help in maintaining a high level of firm power at Niagara. Conversely, in the winter when flow at St. Lawrence is low, the Niagara project can increase the firm power at St. Lawrence. Plans are under way to physically connect the St. Lawrence and Niagara transmission systems. Such a connection will increase the firm power from both projects.

BARNHART-PLATTSBURGH TRANSMISSION LINE

By the end of 1956 all location and right-of-way surveys for the Barnhart-Plattsburgh Transmission Line had been completed, appropriation maps prepared, appraisals made, and right of entry to the entire right of way obtained. Negotiations for settlement with landowners are in progress.

The contract for clearing the right of way was awarded October 11, 1956 and by the end of the year was 40 percent complete. Designs and specifications for construction of the transmission line have been completed, and bids will be opened on January 29, 1957.

Completion of the Transmission Line is scheduled for September 1958.

NIAGARA

REPORT BY URL, HALT & RICH, ENGINEERS

December 11, 1956

Subject: Niagara Power Project
Comparative Cost Estimates
Alternate Conduit Construction Methods

This report is presented in response to your letter of December 5, 1956 in which you request relative costs of various construction alternates for the Niagara Power Project Conduits.

We have considered in this report, that portion of the work between the closure gates near the Conner's Island Intake and the junction of the conduits or channel with the Pump Generator Station Basin.

Three alternate construction methods for this work have been investigated as follows:

A Deep rock tunnels
B Full length cut and cover conduits
C Cut and cover conduits from the closure gates near the Conner's Island Intake to the Niagara City Line and unlined open channel from that point to the junction with the Pump Generator Station Basin.

Engineering estimates for each of these three alternate methods are attached hereto.

Studies of the deep rock tunnel system indicate that three concrete lined tubes, 45 feet inside diameter, would be the most feasible for Item A, from the construction and economic points of view. Each conduit would be about 23,000 feet in length making a total of 69,000 feet.

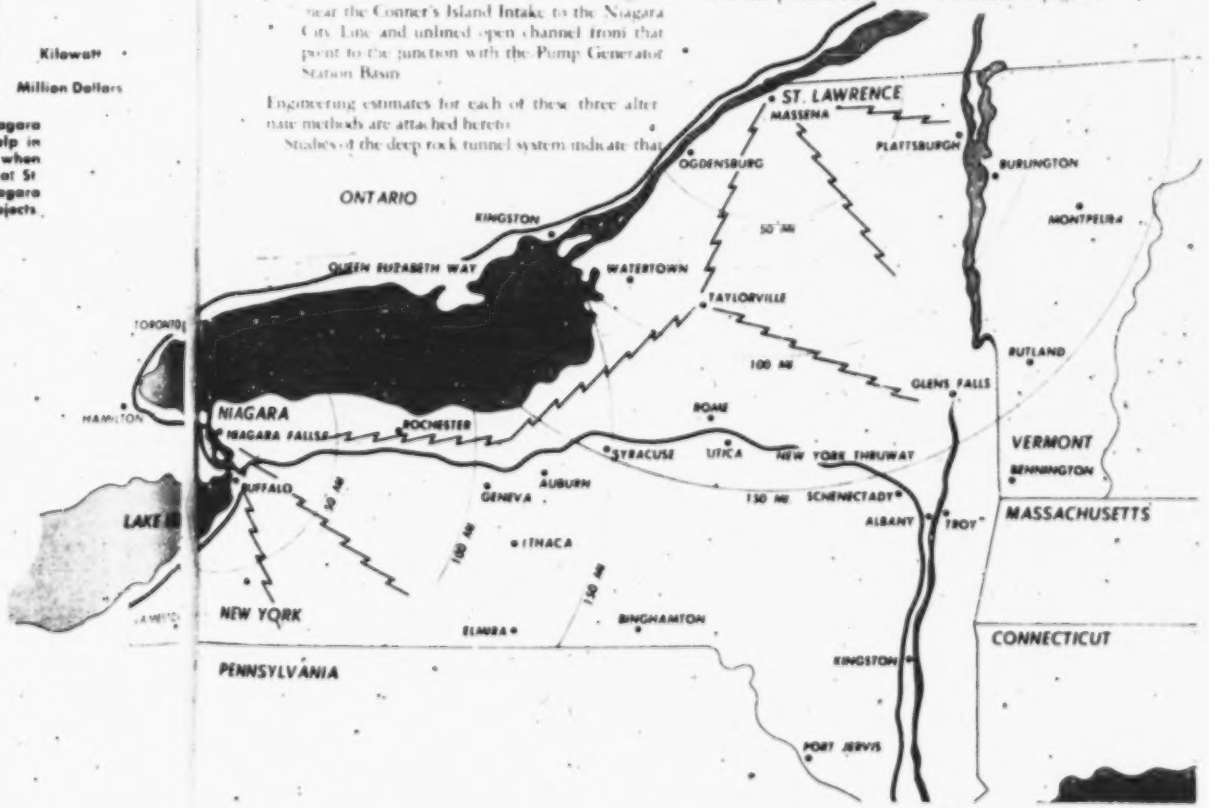
Item B hydraulic studies indicate that two concrete conduits 46' wide, 45' to the spring line with a circular arch roof of 23' radius, to be the most economical.

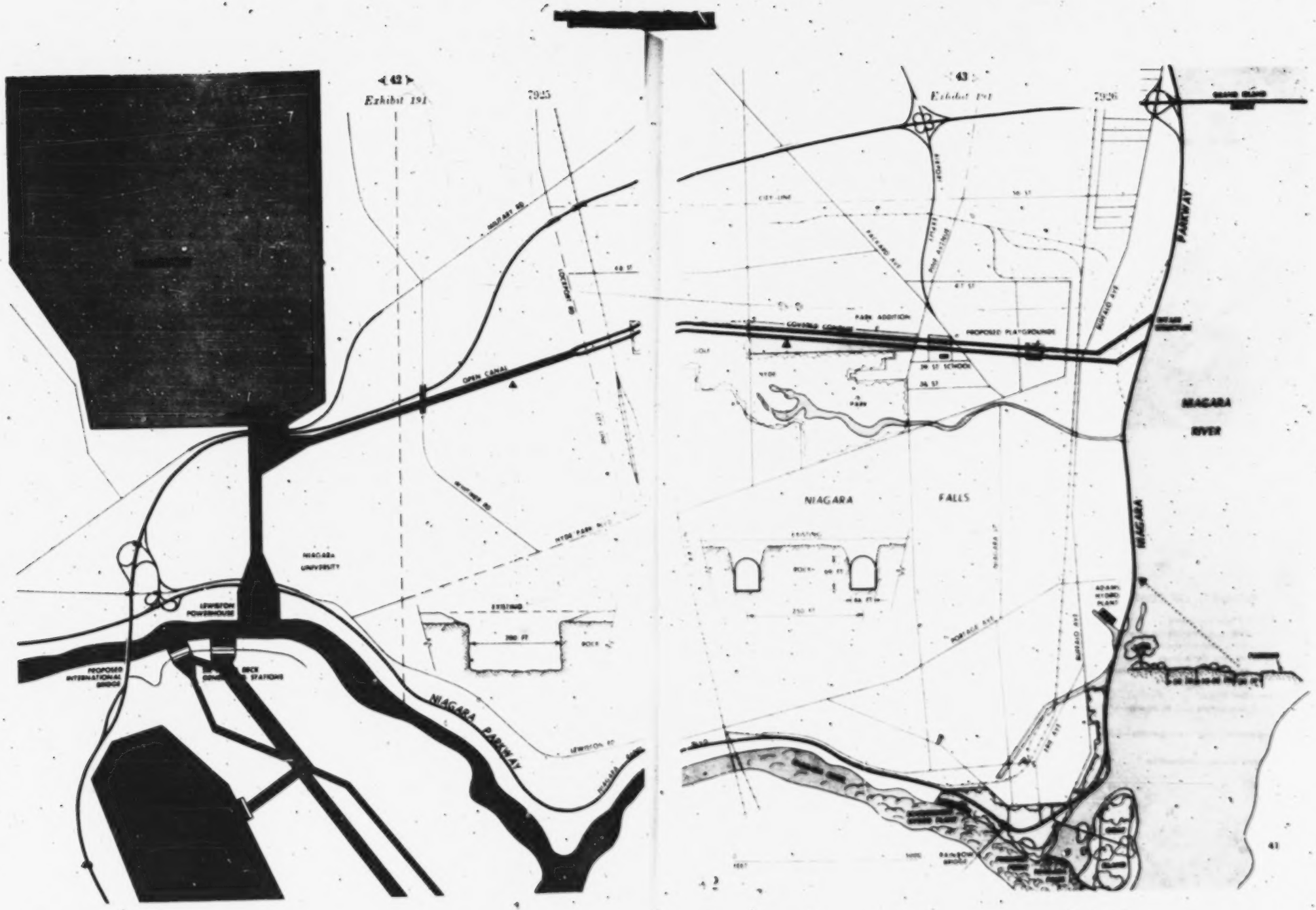
In both Item B and Item C existing rock elevations are such that excavation for practically the full depth of the conduit will be in rock. Rock excavation will be done by the open cut method.

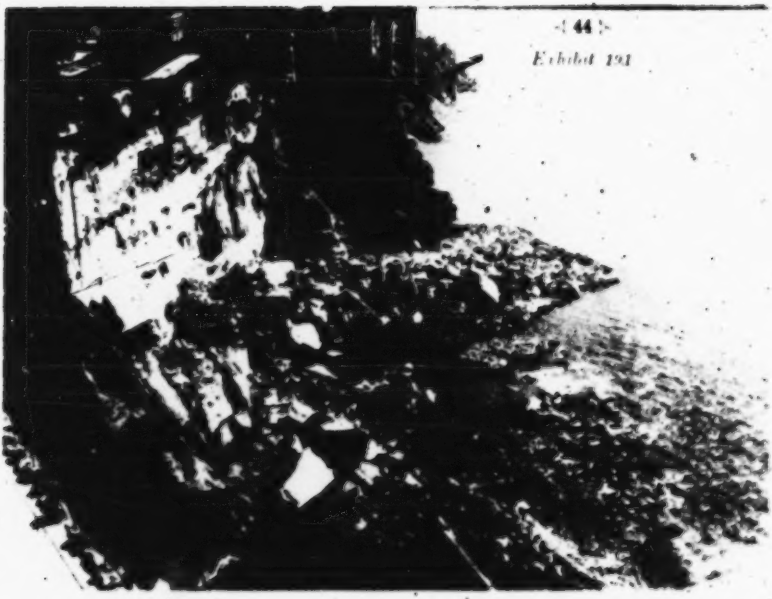
Estimates for Items B and C include provisions for road and railroad crossings, stream diversion and finish grading and landscaping.

Item C substitutes unlined open channel 200' wide for that portion of the covered conduits from the Niagara Falls City Line to the junction with the Pump Generator Station Basin. Studies indicate that the unlined canal is preferable to the lined canal from the economic point of view.

Continued on page 43



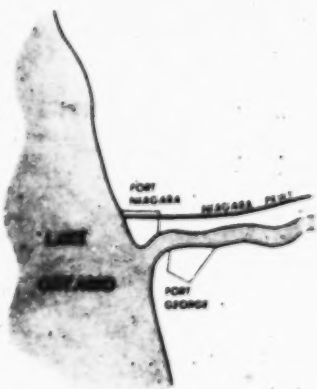

(42)
Exhibit 191
2025
INGRAM RD
LOCKPORT RD
OPEN CANAL
NIAGARA UNIVERSITY
LEWISTON POWERHOUSE
PROPOSED INTERNATIONAL BRIDGE
NIAGARA PARKWAY
(43)
Exhibit 191
2026
PARKWAY
CITY LINE
PARK ADDITION
PROPOSED PLAYGROUNDS
NIAGARA
RIVER
NIAGARA FALLS
NIAGARA
RIVER
41



The Schoellkopf Hydro Plant after the collapse in 1956

ESTIMATE OF COST OF NIAGARA POWER PROJECT

Power Plant Structures (including miscellaneous power plant equipment)		$143,840,000
Reservoirs, Embankments and Waterways		138,020,000
Turbines and Generators		94,500,000
Accessory Electric Equipment including Switchyard		14,300,000
Niagara Parkway		15,000,000
Remedial Works		7,500,000
Land Acquisition and Relocation of Facilities		12,100,000
	Sub Total	$425,220,000
Engineering and Contingencies—25%		106,303,000
	Total	$531,525,000
Interest during construction		34,549,125
	Grand Total	$566,074,125



Opposition to the open channel construction for reasons of safety do not appear warranted as the potential danger at this point is no greater than at the pump storage reservoir. Both the reservoir and open channel are in open country and the required safety protection can be applied effectively in either situation.

The estimates are based on recent bid prices for work of similar character and magnitude applied in a conservative manner. The price of $15.00 per cubic yard for tunnel rock excavation is believed to be a conservative minimum and is comparable to the $7.78 per cubic yard for rock excavation in open cut.

Estimated land damage figures to be applied to each items B and C recognize the recent interim report figures developed by the Thorne Appraisal Service.

A summary of estimate figures is as follows:

Item A $[illegible]

Item B $[illegible]

Item C Damages $[illegible]

$[illegible]

Item A $[illegible]

Item C Damages $[illegible]

$[illegible] $[illegible]

Item not paying to favor of Item A $[illegible]

The principal difference between the estimates of cost for the base construction methods lies in the cost of rock excavation in deep tunnel construction as contrasted with open cut rock excavation at the surface. In this difference the extensive rock drilling and the increased quantity of explosives coupled with the inevitable loss of efficiency of manpower applied in confined locations are the major considerations.

GEORGE R. RICH

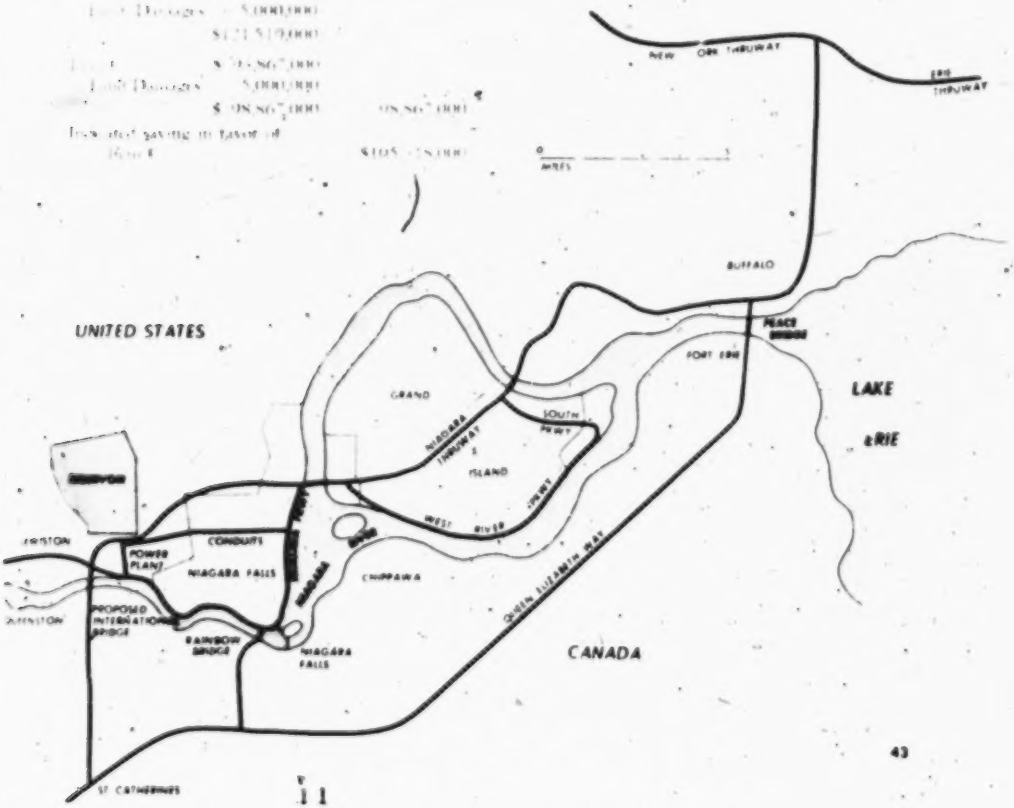


Exhibit 192

Niagara Falls, N.Y.

S
O
P
Y

January 29, 1957

Chief Clinton Richard
Black Rose Spring Road
Niagara Falls, New York

Dear Chief Richard:

Mr. Smith and I greatly appreciated the time you gave us last Tuesday evening. We found the recounting of the experiences of your people most interesting.

As I informed you at that time the annual report of the Power Authority was about to be released. Delivered to you herewith are several copies which you may wish to hand out to the various clans.

Cordially,

William H. Latham
Resident Engineer.

WHL:h
Enc.

Exhibit 193 7939 COPY

POWER AUTHORITY OF THE STATE OF NEW YORK

~~270 BROADWAY~~
~~NEW YORK, N.Y.~~

TELEPHONE WORTH 4-4771

TRUSTEES
ROBERT MOSES
CHAIRMAN
WILLIAM WILSON
VICE CHAIRMAN
JOHN E. BURTON
EDWARD H. CASE
CHARLES POLETTI

WILLIAM S. CHAPIN
GENERAL MANAGER
J. BURCH McMORRAN
CHIEF ENGINEER
THOMAS F. MOORE, JR.
GENERAL COUNSEL
WILLIAM H. LATHAM
RESIDENT ENGINEER
P. O. BOX 119
MASSENA, N. Y.

P.O.Box 327
Niagara Falls, New York
February 20, 1957

Mr.Hamilton Mt.Pleasant
Mt.Hope Road
Niagara Falls, New York

Dear Mr. Mt.Pleasant:

As you undoubtedly are aware by now, present engineering studies on the Niagara Power Project indicate that a portion of the Tuscarora Reservation falls within the projected limits of the Storage Reservoir. The matter has been discussed briefly, in a preliminary way, with Chief Rickard.

Before detailed limits of the Project can be determined it is necessary that certain field survey work be performed. Recognizing the autonomy of the Reservation, our engineers have been instructed that they are not to carry their surveys within the Reservation limits until permission has been secured from the Tribe. The engineers have now developed their work to the point where it is necessary to perform some preliminary surveys within the Reservation limits. Chief Rickard has suggested that the matter of granting permission for such work should be submitted to the General Council and he suggested that I request you to call a meeting of the General Council to consider the request. I would greatly appreciate your cooperation in calling such a meeting.

The dates of March 5th, 6th and 7th would be acceptable to us. However, if none of these dates is suitable to the Council, we would be glad to meet with you at any time you designate.

Enclosed are a copy of the Annual Report of the Power Authority and a booklet on Power Marketing which you may find interesting.

Very truly yours,

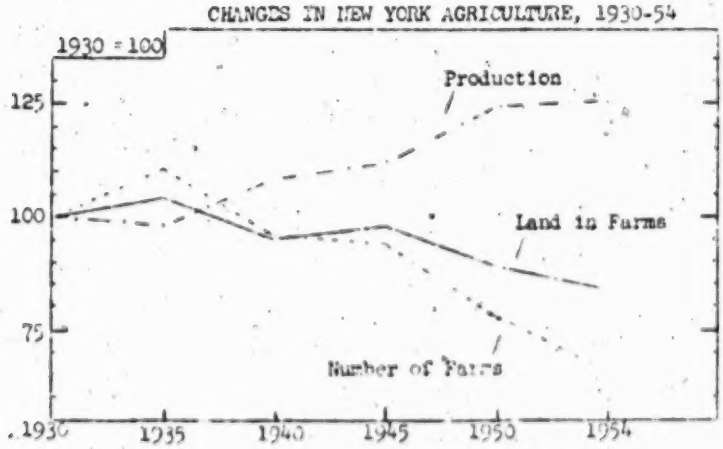
WILLIAM H. LATHAM
Resident Engineer.

WHL:H
Enc.

C.C.: Mr.Harry Smith, 123 Switt St.,Auburn, N.Y.

1954 CENSUS OF AGRICULTURE

NIAGARA COUNTY



1/3 fewer farms, but 1/4 more production

Prepared by C. A. Bratton

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November 1957

Mechanization and technological developments have advanced rapidly in New York agriculture in recent years. From 1930 to 1954 the number of farms in the State decreased one-third and the land in farms decreased one-sixth, but production increased one-fourth. In 1954 there were more than three and one-half times as many tractors on New York farms as there were in 1930, but there were only about one-fifth as many horses and mules.

Changes do not take place equally in all farm areas. Variations exist from county to county and also from town to town within a county. This makes it important to study local as well as statewide changes. Census data over the years has enabled us to trace many of the changes which have occurred. This is of interest from a historical viewpoint, but probably is most useful in projecting future trends. These projections are essential in planning programs for the future.

The Bureau of the Census in Washington gets out reports on state and county data but does not publish data for minor civil divisions. The Bureau, however, has kindly made available the tabulations by towns for New York State. The 1954 data by towns and comparisons with 1930 and 1945 have been reproduced here for use by farm leaders, agricultural workers, and other interested persons throughout the State.

Census data by towns similar to that included in this report were published for 1935, 1940, 1945, and 1950. When using the 1954 Census data for New York towns, it may be helpful to refer back to these earlier publications.

In the 1954 Census, for efficiency reasons, the data for some towns were combined for tabulation and reporting. The combinations are indicated in all tables. In cases where less than three farms reported for any town, the data have been omitted since otherwise it might reveal confidential information.

ACKNOWLEDGEMENTS

The Bureau of the Census in the United States Department of Commerce has collected and made available over the years much valuable information on agriculture. The information included in this report is made possible as a result of the good work of the Bureau.

William I. Bair of the New York Crop Reporting Service, Albany, New York obtained from the Bureau of the Census the tabulations of the data for towns and supervised the copying and verifying of this information.

Theresa Rinkcas, of the New York State College of Agriculture's Department of Agricultural Economics, supervised the statistical work of this report.

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OTHER SOURCES OF CENSUS INFORMATION:

Statistics from the 1954 Census of Agriculture for New York State as a whole and for individual counties are reported in the New York State Department of Agriculture and Markets RMA Release No. 24.

Census data by towns in Niagara County for earlier years were reported in A.E. 616 for 1945, and in A.E. 886 for 1950.

The definitions used in the census are not included in this report. Persons interested in exact definitions are referred to the Bureau of the Census printed reports which are available in many libraries.

NIAGARA COUNTY DATA ON FARMS, LAND USE AND ECONOMIC CLASSES OF FARMS

Item	1930	1945	1954	% Change 1954 from: 1930	1945
FARMS:					
Total number of farms	4,018	3,659	3,223	- 20	- 12
Number of commercial farms 1/	NA	NA	2,010	NA	NA
Number of part-time farms	NA	NA	530	NA	NA
LAND USE:					
Land area in acres	334,080	341,120	341,120	+ 2	0
Acres in farms	282,499	261,997	246,038	- 13	- 6
Per cent of land in farms	85	77	72	- 15	- 6
Cropland harvested (acres)	190,142	149,527	134,809	- 29	- 10
Cropland in pasture (acres)	24,954	17,963	25,751	+ 3	+ 43
Other cropland (acres)	26,955	33,279	45,219	+ 68	+ 36
Woodland pastured (acres)	6,672	3,566	2,389	- 64	- 33
Woodland not pastured (acres)	9,182	12,584	13,059	+ 42	+ 4
Improved pasture (acres)	NA	NA	087	NA	NA
Other pasture (acres)	7,637	17,967	5,382	- 30	- 70
Other land (acres)	16,957	27,111	19,429	+ 15	- 28
Irrigated land in farms (acres)	NA	NA	371	NA	NA
Cropland farmed on contour (acres)	NA	NA	317	NA	NA
FARMS CLASSIFIED BY VALUE OF PRODUCTS SOLD:					
Per cent of commercial farms in:					
Class I - $25,000 or more	NA	2*	7	NA	+250*
Class II - $10,000-24,999	NA	8*	13	NA	+ 62*
Class III - $5,000-9,999	NA	24*	20	NA	- 17*
Class IV - $2,500-4,999	NA	27*	27	NA	0*
Class V - $1,200-2,499	NA	28*	23	NA	- 18*
Class VI - Less than $1,200	NA	11*	10	NA	- 9*

*1950 Census data, 1945 not available on a comparable basis.

NA-Not available.

1/Commercial farms include: all farms selling $1,200 or more of products; and farms with sales of $250 to $1,199 if the operator worked off the farm less than 100 days or if the family's non-farm earnings were less than the value of farm products sold.

NIAGARA COUNTY DATA ON CHARACTERISTICS OF FARMS

Item	1930	1945	1954	% Change 1954 from: 1930	1945
CHARACTERISTICS OF FARMS:					
Average size of farm (acres)	70.3	71.6	76.3	+ 9	+ 7
Per cent of farms by size:					
Under 10 acres	9	11	11	+ 22	0
10 to 99 acres	65	64	61	- 6	- 5
100 to 179 acres	22*	20	20	- 9	0
180 to 499 acres	4*	5	8	+100	+ 60
500 to 999 acres	/	/	/	-	-
1,000 acres and over	-	/	-	-	-
Value of land and buildings:					
Average per farm (dollars)	9,887	7,468	14,019	+ 42	+ 88
Average per acre (dollars)	141	104	189	+ 34	+ 82
Per cent of farms operated by:					
Full owners	71	76	78	+ 10	+ 3
Part owners	10	15	17	+ 70	+ 13
Managers	1	1	1	0	0
Tenants	18	8	4	- 78	- 50
Per cent of farms classified as:					
Dairy	NA	10	15	NA	+ 50
Poultry	NA	11	5	NA	- 55
Other livestock	NA	3	4	NA	+ 33
General	NA	21	10	NA	- 52
Fruit	NA	19	16	NA	- 16
Vegetable	NA	8	2	NA	- 75
Field crop	NA	6	7	NA	+ 17
Miscellaneous	NA	22	41	NA	+ 86
Farms reporting work off farm:					
Total number reporting	NA	1,475	1,975	NA	+ 34
Number reporting 100 days or more	NA	1,330	1,650	NA	+ 24

*100 to 174 acres and 175 to 499 acres reported in 1930.

/Less than 1 per cent.

NA-Not available.

NIAGARA COUNTY DATA ON LIVESTOCK, EQUIPMENT AND EXPENSES

Item	1930	1945	1954	% Change 1954 from: 1930	1945
LIVESTOCK NUMBERS:					
Milk cows	11,374	11,053*	12,008	+ 6	+ 9
Heifers and heifer calves	8,073	NA	8,481	+ 5	NA
Hogs and pigs	7,666	8,372	8,461	+ 10	+ 1
Sheep and lambs	13,955	6,542	4,854	- 65	- 26
Chickens, 4 mo. old & over	319,012	339,033	304,358	- 5	- 10
Horses and mules	7,751	4,353	1,153	- 85	- 74
EQUIPMENT AND FACILITIES:					
Number of:					
Tractors	2,209	3,155	4,670	+111	+ 48
Trucks	1,912	1,784	2,115	+ 11	+ 19
Automobiles	3,933	3,918	3,950	+ .4	+ 1
Grain combines	NA	NA	545	NA	NA
Corn pickers	NA	NA	130	NA	NA
Pick-up balers	NA	NA	320	NA	NA
Field forage harvesters	NA	NA	160	NA	NA
Farms with milking machines	NA	NA	660	NA	NA
Per cent of farms with:					
Electricity	52	93	99	+ 90	+ 6
Telephone	46	54	80	+ 74	+ 48
Piped running water	25	55	81	+224	+ 47
Home freezers	NA	NA	47	NA	NA
Television sets	NA	NA	73	NA	NA
FARM EXPENSES:					
Average expense per farm reporting for:					
Feed	$ 276	$ 654	$ 911	+230	+ 39
Hired labor	513	1,018	1,472	+187	+ 45
Machine hire	NA	NA	186	NA	NA
Gas and oil	NA	NA	276	NA	NA
Commercial fertilizer	99	NA	317	+220	NA

* Cows and heifers milked.

Exhibit 207
-5-

8123 NIAGARA COUNTY
Crops - Acres
and Yield

NIAGARA COUNTY DATA ON ACREAGE AND YIELD OF CROPS

Item	1929	1944	1954	% Change 1954 from: 1929	1944
ACRES OF CROPS HARVESTED:					
All hay	62,225	47,812	38,540	- 38	- 19
Corn for all purposes	15,033	14,739	23,580	+ 57	+ 60
Corn for silage	5,195	NA	5,507	+ 6	NA
Corn for grain	4,140	5,070	17,472	+322	+245
Wheat	22,237	23,329	22,861	+ 3	- 2
Oats	18,518	14,021	17,321	- 6	+ 24
Barley	2,581	612	1,147	- 56	+ 87
Rye	618	277	241	- 61	- 13
Buckwheat	3,437	NA	1,333	- 61	NA
All other grains	3,815	730	589	- 85	- 19
Dry beans	1,329	637	598	- 55	- 6
Potatoes (Irish)	2,197	1,004	330	- 85	- 67
Vegetables for sale	7,514	10,253	5,474	- 27	- 47
Berries and small fruits	176	114	94	- 47	- 18
Tree fruits	51,546	33,617	23,118	- 55	- 31
AVERAGE YIELD PER ACRE:					
All hay, tons	1.2	1.4	1.5	+ 25	+ 7
Corn for silage, tons	5.8	NA	6.5	+ 12	NA
Corn for grain, bu.	33	26	45	+ 36	+ 73
Wheat, bu.	12	25	29	+142	+ 16
Oats, bu.	25	31	38	+ 52	+ 23
Barley, bu.	21	23	29	+ 38	+ 26
Rye, bu.	13	17	20	+ 54	+ 18
Buckwheat, bu.	13	NA	17	+ 31	NA
Dry beans, 100# bags	7.1	7.7	7.1	0	- 8
Potatoes (Irish), bu.	67	79	164	+145	+108

NA-Not available.

NIAGARA COUNTY
Farms Reporting
Truck Crops
Berries & Fruit

Exhibit 207
-6-

NIAGARA COUNTY DATA ON
NUMBER OF FARMS REPORTING MAJOR TRUCK CROPS, BERRIES & FRUITS

Item	1929	1949	1954	% Change 1954 from: 1929	1949
	NUMBER OF FARMS REPORTING				
VEGETABLES HARVESTED FOR SALE (ex. potatoes):	NA	1,116	775	NA	- 31
Asparagus	52	52	53	+ 2	+ 2
Snap Beans	186	94	83	- 55	- 12
Lima beans	3	44	39	+1,200	- 11
Beets	16	51	37	+131	- 27
Cabbage	953	447	371	- 61	- 17
Centaloupes	283	323	NA	NA	NA
Carrots	40	50	28	- 30	- 44
Cauliflower	19	35	21	+ 11	- 40
Celery	34	17	NA	NA	NA
Sweet corn	527	430	359	- 32	- 17
Cucumbers	661	237	176	- 73	- 26
Lettuce	73	43	16	- 78	- 63
Dry onions	69	30	16	- 77	- 47
Green peas	201	158	39	- 81	- 75
Spinach	40	11	6	- 85	- 45
Squash	30	228	183	+510	- 20
Tomatoes	1,246	844	513	- 59	- 39
BERRIES:					
Strawberries	383	109	122	- 68	+ 12
Blackberries	62	22	NA	NA	NA
Raspberries	248	100	99	- 60	- 1
FRUITS:					
Apples	3,531	1,604	1,215	- 66	- 24
Cherries, Sour	1,362*	909	785	- 42*	- 14
Cherries, Sweet	1,038*	751	743	- 28*	- 1
Peaches	1,657	1,101	907	- 45	- 18
Pears	2,557	1,096	819	- 68	- 25
Plums & Prunes	1,817	961	747	- 59	- 22
Grapes	1,379	813	628	- 54	- 23

*1939 data, 1940 is first census report separating sweet and sour cherries.

NA- Not available.

Exhibit 207

NIAGARA COUNTY
Acres of Truck
Crops & Berries
Fruit Trees

NIAGARA COUNTY DATA ON
ACREAGE OF MAJOR TRUCK CROPS & BERRIES AND NUMBERS OF FRUIT TREES & GRAPEVINES

Item	1929	1949	1954	% Change 1954 from: 1929	1949
		ACRES			
VEGETABLES HARVESTED FOR SALE (ex. potatoes):	7,514	8,083	5,474	- 27	- 32
Asparagus	33	43	44	+ 33	+ 2
Snap beans	192	28	250	+ 30	+793
Lima beans	2	9	42	+2,000	+367
Beets	19	17	10	- 47	- 41
Cabbage	2,151	1,461	1,252	- 42	- 14
Canteloupes	315	432	NA	NA	NA
Carrots	36	34	11	- 69	- 68
Cauliflower	25	28	34	+ 36	+ 21
Celery	49	65	NA	NA	NA
Sweet corn	521	664	642	+ 23	- 3
Cucumbers	701	236	193	- 74	- 22
Lettuce	72	24	12	- 83	- 50
Dry onions	61	11	3	- 95	- 73
Green peas	683	989	179	- 74	- 82
Spinach	28	3	2	- 93	- 33
Squash	28	333	238	+750	- 29
Tomatoes	2,227	3,417	1,778	- 20	- 48
BERRIES:					
Strawberries	82	32	46	- 44	+ 44
Blackberries	13	4	NA	NA	NA
Raspberries	74	35	27	- 64	- 23
		NUMBER OF TREES OR VINES			
FRUITS:					
Apples, bearing	949,583	479,390	379,391	- 60	- 21
" , non-bearing	211,534	52,065	55,871	- 74	+ 7
Cherries, Sour; bearing	95,962*	108,516	115,218	+ 20*	+ 6
" " ; non-bearing	17,588*	55,607	17,082	- 3*	- 69
Cherries, Sweet; bearing	19,610*	26,868	36,275	+ 85*	+ 35
" " ; non-bearing	11,191*	6,603	4,070	- 64*	- 38
Peaches, bearing	506,047	376,504	299,523	- 41	- 20
" , non-bearing	274,336	66,423	35,205	- 87	- 47
Pears, bearing	394,495	101,681	85,675	- 78	- 16
" , non-bearing	26,122	14,059	14,844	- 43	+ 6
Plums & Prunes, bearing	174,029	126,379	91,901	- 47	- 27
" " , non-bearing	15,523	21,516	14,440	- 7	- 33
Grapes, bearing	1,402,930	619,509	783,498	- 44	+ 26
" , non-bearing	106,013	154,449	56,166	- 47	- 64

Reported in small fractions.
*1939 data, 1940 is first census report seperating sweet and sour cherries.
NA- Not available.

NUMBER OF FARMS

Townships	1930	1945	1954	% Change 1954 from: 1930	1945
Cambria	334	331	274	- 18	- 17
Hartland	453	416	392	- 13	- 6
Lewiston	276	238	223	- 19	- 6
Lockport	401	309	312	- 22	+ 1
Newfane	507	448	412	- 19	- 8
Niagara	50	86	28	- 44	- 67
Pendleton	215	210	215	0	+ 2
Porter	226	211	205	- 9	- 3
Royalton	499	357	398	- 20	+ 11
Somerset	271	222	197	- 27	- 11
Wheatfield	297	201	164	- 45	- 18
Wilson	430	411	376	- 13	- 9
Tuscarora Ind. Reservation	59	99	27	- 54	- 73
County Total	4,018	3,659*	3,223	- 20	- 12

*Includes data for incorporated places reported separately.

LAND IN FARMS

Townships	Total Land in Farms					Acres of Cropland Harvested 1954
	Acres			% Change 1954 from:		
	1930	1945	1954	1930	1945	
Cambria	24,619	22,398	21,525	- 13	- 4	11,785
Hartland	30,098	26,445	27,825	- 8	- 2	13,241
Lewiston	21,066	16,914	17,738	- 16	+ 5	10,305
Lockport	26,929	24,063	22,925	- 15	- 5	11,620
Newfane	29,560	28,228	25,773	- 13	- 9	13,571
Niagara	4,589	4,118	2,227	- 51	- 46	1,627
Pendleton	14,209	13,099	11,793	- 17	- 10	5,663
Porter	18,657	21,287	15,642	- 16	- 27	9,811
Royalton	41,048	33,626	37,142	- 10	+ 10	20,221
Somerset	22,681	19,533	19,933	- 12	+ 2	10,831
Wheatfield	17,094	14,538	14,420	- 16	- 1	10,207
Wilson	27,948	27,820	26,229	- 6	- 6	15,320
Tuscarora Indian Reservation	4,001	3,883	2,866	- 28	- 26	607
County Total	282,499	261,997*	246,038	- 13	- 6	134,809

*Includes data for incorporated places reported separately.

ACRES PER FARM AND IRRIGATED LAND

Townships	Acres per Farm					Acres Irrigated 1954
	1930	1945	1954	% Change 1954 from: 1930	1945	
Cambria	74	68	79	+ 7	+ 16	58
Hartland	66	68	71	+ 8	+ 4	3
Lewiston	76	71	80	+ 5	+ 13	58
Lockport	67	78	73	+ 9	- 6	87
Newfane	58	63	63	+ 9	0	99
Niagara	92	48	80	- 13	+ 67	-
Pendleton	66	62	55	- 17	- 11	-
Porter	83	101	76	- 8	- 25	2
Royalton	82	94	93	+ 13	- 1	42
Somerset	84	88	101	+ 20	+ 15	21
Wheatfield	58	72	88	+ 52	+ 22	-
Wilson	65	68	70	+ 8	+ 3	1
Tuscarora Ind. Res.	68	39	106	+ 56	+172	-
County Total	70	72	76	+ 9	+ 6	371

FARMS REPORTING MILK COWS

Townships	Farms Reporting Milk Cows			Farms Reporting Milk Sold
	1945	1954	% Change 1954 from 1945	1954
Cambria	205	129	- 37	56
Hartland	267	190	- 29	92
Lewiston	121	98	- 19	33
Lockport	190	131	- 31	66
Newfane	250	160	- 36	74
Niagara	37	15	- 59	9
Pendleton	90	101	+ 12	45
Porter	110	80	- 27	45
Royalton	255	231	- 9	107
Somerset	147	119	- 19	70
Wheatfield	156	88	- 44	58
Wilson	271	174	- 36	71
Tuscarora Ind. Res.	16	6	- 62	1
County Total	2,148*	1,522	- 29	727

NUMBER OF MILK COWS

Townships	Number of Milk Cows		
	1945	1954	% Change 1954 from 1945
Cambria	869	1,066	+ 23
Hartland	1,250	1,451	+ 16
Lewiston	769	725	- 6
Lockport	1,066	1,297	+ 22
Newfane	931	874	- 6
Niagara	228	135	- 41
Pendleton	472	653	+ 38
Porter	656	756	+ 15
Royalton	1,495	1,747	+ 17
Somerset	827	1,072	+ 30
Wheatfield	998	850	- 15
Wilson	1,312	1,356	+ 3
Tuscarora Ind. Res.	55	26	- 53
County Total	11,053*	12,008	+ 9

*Includes data for incorporated places reported separately.

FARMS REPORTING POULTRY

Townships	Farms Reporting Chickens on Hand			Number of Farms Reporting 1954		
	1945	1954	% Change 1954 from 1945	Eggs Sold	Broilers Sold	Turkeys Raised
Cambria	218	133	- 39	97	4	4
Hartland	297	211	- 29	132	4	20
Lewiston	155	121	- 22	78	1	8
Lockport	230	153	- 33	78	1	11
Newfane	326	217	- 33	130	4	21
Niagara	71	14	- 80	9	-	-
Pendleton	143	145	+ 1	89	-	14
Porter	134	95	- 29	67	5	9
Royalton	243	247	+ 2	142	-	20
Somerset	139	92	- 34	52	1	5
Wheatfield	169	116	- 31	82	1	10
Wilson	294	171	- 42	115	4	4
Tuscarora Ind. Res.	59	13	- 78	3	-	3
County Total	2,539*	1,728	- 32	1,074*	25	129

NUMBER OF CHICKENS ON HAND

Townships	Number of Chickens on Hand		
	1945	1954	% Change 1954 from 1945
Cambria	30,800	29,357	- 5
Hartland	41,259	39,587	- 4
Lewiston	27,174	17,373	- 36
Lockport	16,671	25,645	+ 54
Newfane	42,253	39,637	- 6
Pendleton	13,105	15,503	+ 18
Porter	22,168	25,902	+ 17
Royalton	36,987	33,382	- 10
Somerset	26,099	16,046	- 39
Wheatfield	18,496	21,196	+ 15
Wilson	42,416	38,673	- 9
Tuscarora Ind. Res.	3,184	485	- 85
County Total	339,033*	304,358	- 10

*Includes data for incorporated places reported separately.

FOR YOUR NOTES AND COMMENTS

ACREAGE OF WHEAT AND OATS, 1954

Townships	Wheat		Oats	
	Farms Reporting	Acres	Farms Reporting	Acres
Cambria	180	2,143	151	1,828
Hartland	205	2,437	178	1,868
Lewiston	114	1,816	89	1,071
Lockport	140	1,628	120	1,445
Newfane	216	2,136	148	1,297
Niagara	19	353	18	374
Pendleton	116	945	81	661
Porter	109	1,296	65	680
Royalton	281	3,941	247	3,345
Somerset	130	1,424	108	1,186
Wheatfield	109	2,247	92	1,996
Wilson	229	2,321	163	1,437
Tuscarora Ind. Res.	6	174	4	133
County Total	1,854	22,861	1,464	17,321

ACREAGE OF CORN, 1954

Townships	All Corn		Corn for Grain	
	Farms Reporting	Acres	Farms Reporting	Acres
Cambria	158	2,189	146	1,794
Hartland	225	2,690	197	1,889
Lewiston	115	1,604	96	1,243
Lockport	139	1,906	114	1,136
Newfane	219	2,583	203	2,188
Niagara	15	182	12	128
Pendleton	93	704	69	385
Porter	99	1,735	93	1,358
Royalton	222	3,014	185	2,054
Somerset	134	1,764	116	1,166
Wheatfield	89	1,473	65	973
Wilson	243	3,651	229	3,073
Tuscarora Ind. Res.	5	85	5	85
County Total	1,756	23,580	1,530	17,472

ACREAGE OF DRY BEANS & POTATOES, 1954

Townships	Dry Beans		Potatoes	
	Farms Reporting	Acres	Farms Reporting	Acres
Cambria	2	#	13	19.6
Hartland	7	61	38	30.5
Lewiston	1	#	12	68.0
Lockport	4	12	8	8.1
Newfane	-	-	50	37.7
Niagara	-	-	-	-
Pendleton	5	28	12	7.9
Porter	1	#	5	3.0
Royalton	38	418	25	61.4
Somerset	2	#	23	42.0
Wheatfield	-	-	10	8.5
Wilson	2	#	24	42.5
Tuscarora Ind. Res.	2	#	1	#
County Total	64	598	221	329.7

SELECTED VEGETABLES, 1954

Townships	Farms Reporting Vegetables 1/	Green Beans		Green Lima Beans		Broccoli	
		Farms	Acres	Farms	Acres	Farms	Acres
Cambria	75	13	4.5	7	1.2	3	1.3
Hartland	103	5	4.4	3	4.1	4	24.5
Lewiston	51	9	3.0	4	.5	3	1.8
Lockport	46	6	.9	2	#	-	-
Newfane	155	17	3.5	7	4.8	3	2.2
Niagara	2	-	-	-	-	-	-
Pendleton	33	7	1.8	1	#	-	-
Porter	39	-	-	1	#	2	#
Royalton	37	2	#	-	-	4	15.3
Somerset	74	5	13.3	4	27.9	30	200.2
Wheatfield	22	3	.3	1	#	3	.7
Wilson	138	16	33.5	9	2.7	4	19.4
Tuscarora Ind. Res	-	-	-	-	-	-	-
County Total	775	83	250.5	39	41.9	56	289.5

1/Total vegetables harvested for sale excluding potatoes.
#Data for less than 3 farms omitted to avoid disclosures.

SELECTED VEGETABLES, 1954 (cont.)

Townships	Cabbage		Cauliflower		Sweet Corn		Cucumbers & Pickles	
	Farms	Acres	Farms	Acres	Farms	Acres	Farms	Acres
Cambria	32	56.6	3	2.1	49	84.5	24	13.8
Hartland	49	160.9	1	#	28	46.7	21	31.1
Lewiston	13	16.9	7	20.5	42	140.7	14	6.7
Lockport	16	65.7	-	-	17	23.6	3	2.1
Newfane	90	306.6	2	#	74	104.1	28	24.3
Niagara	-	-	-	-	2	#	-	-
Pendleton	16	28.9	2	3.1	24	24.2	12	3.5
Porter	6	14.0	-	-	16	17.9	5	5.7
Royalton	15	55.2	1	#	9	13.5	2	#
Somerset	45	226.6	-	-	17	23.3	12	22.1
Wheatfield	14	18.9	4	2.6	18	44.3	5	3.2
Wilson	75	301.9	1	#	63	114.7	50	70.3
Tuscarora Ind. Res.	-	-	-	-	-	-	-	-
County Total	371	1,252.2	21	33.9	359	642.0	176	183.2

SELECTED VEGETABLES, 1954 (cont.)

Townships	Green Peas		Sweet Peppers & Pimientos		Squash		Tomatoes	
	Farms	Acres	Farms	Acres	Farms	Acres	Farms	Acres
Cambria	4	27.2	34	42.0	33	49.0	56	120.0
Hartland	5	10.3	3	3.2	7	10.3	52	172.0
Lewiston	2	#	10	3.0	11	8.1	35	59.3
Lockport	2	#	5	3.6	10	16.3	35	166.5
Newfane	3	6.4	14	4.6	37	26.4	93	224.6
Niagara	-	-	-	-	-	-	-	-
Pendleton	1	#	5	2.7	11	12.5	23	13.0
Porter	1	#	7	4.3	8	15.0	31	116.4
Royalton	11	71.0	2	#	2	#	24	265.2
Somerset	8	40.6	4	1.2	11	13.2	44	251.0
Wheatfield	1	#	3	4.5	7	5.0	16	17.1
Wilson	1	#	44	48.9	46	78.3	104	372.5
Tuscarora Ind. Res.	-	-	-	-	-	-	-	-
County Total	39	178.9	131	119.0	183	238.4	513	1,777.6

Data for less than 3 farms omitted to avoid disclosures.

FOR YOUR NOTES AND COMMENTS

STRAWBERRIES IN 1954

Townships	Farms Reporting	Acres	Production (quarts)
Cambria	13	4.3	5,904
Hartland	17	6.7	4,900
Lewiston	3	.4	258
Lockport	6	.9	1,915
[illegible]ene	29	11.4	28,400
[illegible]ara	-	-	-
[illegible]leton	11	3.2	1,793
[illegible]ter	4	.8	940
Royalton	2	#	#
Somerset	8	5.7	4,535
Wheatfield	7	3.1	3,100
Wilson	18	5.6	7,602
Tuscarora Ind. Res.	4	3.4	3,480
County Total	122	46.2	64,027

#Data for less than 3 farms omitted to avoid disclosures.

LAND IN FRUIT

Townships	Farms Reporting 1944	Farms Reporting 1954	Farms Reporting % Change 1954 from 1944	Acres 1944	Acres 1954	Acres % Change 1954 from 1944
Cambria	269	176	- 35	2,723	1,536	- 44
Hartland	313	241	- 23	3,212	1,654	- 49
Lewiston	113	164	+ 45	2,199	2,433	+ 11
Lockport	227	180	- 21	1,983	1,685	- 15
Newfane	393	260	- 34	5,812	3,995	- 31
Niagara	24	10	- 58	56	46	- 18
Pendleton	109	91	- 17	367	230	- 37
Porter	191	162	- 15	5,822	3,852	- 34
Royalton	156	138	- 12	1,776	1,456	- 18
Somerset	166	113	- 32	3,539	2,662	- 25
Wheatfield	91	66	- 27	483	337	- 30
Wilson	330	201	- 39	4,938	3,097	- 37
Tuscarora Ind. Res.	40	15	- 62	259	135	- 48
County Total	2,488*	1,817	- 27	33,617*	23,118	- 31

*Includes data for incorporated places reported separately.

APPLES IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Bu.)
Cambria	92	2,032	13,380	61,279
Hartland	161	1,567	34,848	123,987
Lewiston	97	1,906	18,060	87,149
Lockport	126	10,971	24,760	114,483
Newfane	168	15,124	72,268	431,369
Niagara	5	100	1,223	-
Pendleton	69	191	4,103	4,371
Porter	129	4,699	60,431	349,524
Royalton	102	1,053	35,696	196,237
Somerset	90	9,835	53,750	346,454
Wheatfield	42	229	5,372	1[illegible],756
Wilson	126	7,727	55,396	275,773
Tuscarora Ind. Res.	8	437	84	[illegible]0
County Total	1,215	55,871	379,371	2,003,442

SOUR CHERRIES IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Lb.)
Cambria	65	218	5,599	465,891
Hartland	128	2,492	14,750	800,483
Lewiston	53	846	9,479	362,772
Lockport	82	3,127	8,045	441,429
Newfane	133	2,900	26,189	1,279,367
Niagara	2	#	#	#
Pendleton	46	48	1,1[illegible]	209,325
Porter	77	1,962	9,7[illegible]	494,562
Royalton	65	1,172	18,051	773,997
Somerset	57	2,713	11,756	579,296
Wheatfield	16	8	289	24,004
Wilson	57	1,582	10,177	663,584
Tuscarora Ind. Res.	4	12	6	-
County Total	785	17,082	11[illegible],218	6,094,710

SWEET CHERRIES IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Lb.)
Cambria	68	120	2,118	130,903
Hartland	109	661	9,869	385,347
Lewiston	79	335	6,006	406,879
Lockport	84	763	3,305	213,945
Newfane	142	836	6,568	545,896
Niagara	2	#	#	#
Pendleton	35	35	154	10,524
Porter	69	301	2,558	135,760
Royalton	55	53	2,397	147,099
Somerset	38	265	1,706	140,494
Wheatfield	11	-	88	7,478
Wilson	42	428	1,236	109,033
Tuscarora Ind. Res.	9	246	194	4,050
County Total	743	4,070	36,275	2,237,658

Data for less than 3 farms omitted to avoid disclosures.

PEACHES IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Bu.)
Cambria	85	1,705	8,659	9,530
Hartland	115	2,789	9,062	10,565
Lewiston	68	2,423	29,696	32,262
Lockport	86	5,162	14,043	20,429
Newfane	162	8,256	72,285	154,423
Niagara	2	#	#	#
Pendleton	41	302	2,030	1,573
Porter	125	7,906	90,195	128,768
Royalton	58	413	12,829	19,472
Somerset	52	2,733	20,575	48,121
Wheatfield	11	84	1,255	1,017
Wilson	94	2,545	38,526	61,903
Tuscarora Ind. Res.	8	882	149	36
County Total	907	35,205	299,523	488,199

Data for less than 3 farms omitted to avoid disclosures.

PEARS IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Bu.)
Cambria	62	126	5,091	4,689
Hartland	97	495	6,833	1,210
Lewiston	75	1,519	8,831	5,587
Lockport	102	2,276	5,591	3,977
Newfane	95	1,661	8,910	5,890
Niagara	4	-	227	29
Pendleton	66	68	1,694	823
Porter	78	3,856	17,988	26,641
Royalton	70	996	14,169	3,557
Somerset	35	1,974	4,174	7,131
Wheatfield	38	148	2,930	3,185
Wilson	87	1,299	8,182	5,088
Tuscarora Ind. Res.	10	426	1,055	271
County Total	819	14,844	85,675	68,078

PLUMS & PRUNES IN 1954

Townships	Farms Reporting	Trees not of bearing age	Trees of bearing age	Production (Lbs.)
Cambria	54	964	4,856	786
Hartland	69	561	3,357	2,842
Lewiston	82	2,663	14,139	10,092
Lockport	70	1,657	3,282	1,830
Newfane	116	3,594	9,019	10,578
Niagara	5	0	1,152	13
Pendleton	49	141	874	176
Porter	102	2,764	29,409	26,643
Royalton	44	652	2,151	1,858
Somerset	31	332	2,452	3,367
Wheatfield	27	102	1,752	43
Wilson	93	1,006	19,304	11,725
Tuscarora Ind. Res.	5	4	154	0
County Total	747	14,440	91,901	69,953

GRAPES IN 1954

Townships	Farms Reporting	Vines not of bearing age	Vines of bearing age	Production (Lb.)
Cambria	123	15,965	245,465	2,198,817
Hartland	33	751	7,669	56,855
Lewiston	102	21,070	269,911	2,721,892
Lockport	51	745	20,556	230,813
Newfane	44	834	15,037	141,253
Niagara	4	0	2,800	31,116
Pendleton	-	-	-	-
Porter	41	1,500	58,198	583,687
Royalton	34	213	7,574	28,702
Somerset	45	1,633	7,834	59,375
Wheatfield	52	1,133	43,844	342,289
Wilson	88	2,832	87,170	1,039,345
Tuscarora Ind. Res.	11	9,490	17,440	51,700
County Total	628	56,166	783,498	7,485,844

DEPARTMENT OF COMMERCE
Bureau of the Census
Washington 25

POPULATION OF TESCARORA INDIAN RESERVATION BY RACE AND SEX: 1950

(Based on hand tabulations from the 1950 population schedules)

Sex	All classes	White	Indian
Total	634	30	604
Male	314	18	296
Female	320	12	308

Exhibit 209 8144

U.S. Department of Commerce
Bureau of the Census
Washington 25, D.C.

May 16, 1958

INDUSTRY GROUP OF EMPLOYED PERSONS BY SEX, FOR TUSCARORA INDIAN RESERVATION, NIAGARA COUNTY, N.Y. (1950)

	TOTAL	Male	Female
Total Employed	152	120	32
Agriculture, Forestry, Fisheries	28	25	3
Mining	-	-	-
Construction	34	34	-
Manufacturing-Durable	32	29	3
Manufacturing-non-Durable	24	19	5
Transportation, Communication and Other Public Utilities	1	1	-
Wholesale and Retail Trade	10	5	5
Finance, Insurance, and Real Estate	-	-	-
Business and Repair Services	2	2	-
Personal Services	10	-	10
Entertainment and Recreation Services	-	-	-
Professional and Related Services	7	3	4
Public Administration	4	2	2

			Born
Anderson,	Duane	Husband	1929
	Isabell	wife	
	Duane Jr.		Feb 17-1950
	Douglas		Mar 18-1951
	Rex Paul		1953
Anderson,	Sydney		1926
?,	Wallace		1927
Austin,	Clifford		1924
AUSTIN,	Arleda L. Chew		1905
Basil,	Florence A.		1922
(Cogan) Anderson,	Lena		1931
	Steven Ellwood		Feb 5/54
	Martha Phyllis		Aug 1/52
	Monica Ann		2/29/55
	Ronald Keith		May 20/56
Blake,	Vera (Hewett)		

<78>

0146

[illegible]	[illegible]	912
	[illegible]	[illegible]
	[illegible]	2/3/21
	[illegible]	3/10/13
	[illegible]	[illegible]
	[illegible]	2/9/22
	[illegible]	9/4/17

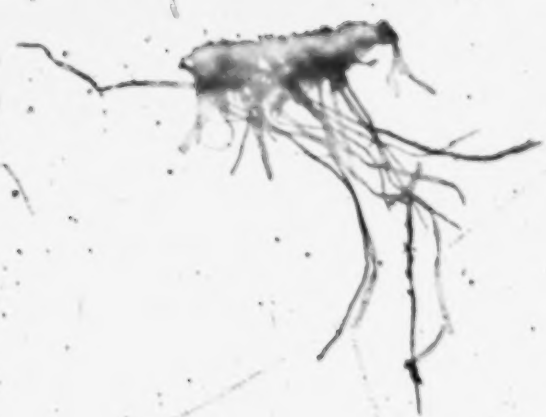
Billings,	Jeannette E. wife	1921		live on
	Russellen K.	1938		
	Beverly O	1943		
	Shirley	1947		
	Richard	1949		
	Robert	1947		
	Russell Allen			
	Lena	6/18/51		
	Ronald	8/11/53		
	John Michael	3/12/58		
Fischer,	Dorothy E.	1896		live off
Bissell,	Charles	1906		" wife
	Minerva P. wife	1910		"
	Chas. Jr.	1928		"
	Delilah	1883	died	
	Henry	1889	died	
	Paul R.	1921		live w - wife
	Sherman	1916		

Exhibit 210 8148

Bomberry,	Marjorie wife	1920	Enrolled on Cowichan Lic
Chew,	Wilford son	1938	Enrolled on Lummi
Chew,	Terry	1941	"
Chew,	Cheryl M. dau.	1944	"
Bomberry,	Wilton Chester Jr. son	1947	Enrolled on Cowichan
	Et Darlene Ellen	1949	"
	Henry Roy	1/16/55	"
Brayley,	Beulah A.	1909	Living
	Benjamen Sr.	1891	Living
	Warren J.	1885	died
Chew,	Arthur T.	1904	Living
	Carroll	1913	Living
	Emely H.	1908	"
	Ernest	1905	Living
Chew,	George	1892	Living
Chew,	Hubert C.	1917	Living
	Shirley J.	1919	Living
	Terry son	1937	Living

(Jacobs) Chico Helen J.
Neal Shirley 5/14/57
Johnny Steve July 22/57

(Sycamore) Ino, Betty 1931
Randall
Debra Ellouise
Clyde Kevin Nov 13/57
Marcie Lynn June 24/57



Chew.	Jefferson	1868	died 3/24/50	
	Bertie J. wife	1908		lives on
	Merle son	1924	died	
	Raymond	1936		"
(Chew) Thompson	Edward	1927		"
	Beverly wife	1937		"
	Edward Craig son	Nov 5/57		"
	Carolyn M	1939		"
	Edward Graham son	4/9/58		"
	Stella M.	1944		"
(Christie) Chew.	Lucy	1918		lives on with G
Chew.	McAllister	1914	died	
Chew.	William	1871	died	
Chew.	Edith	1905		3414 Carnegie Ave Cleveland, Ohio
	Emily	1928		
	Raymond	1927		"

Crouse, Dorothy 1913 [illegible]

(Mrs.) Crisuck, Eliza J. 1922 "

Carl E. 1941 "
Jesse T. 1942 "
Rex J. 1943 "
James M. 1945 "
Yvonne Diane 1946 "
Edna 1/6/50 "
Eugene 8/24/50 "
Clara 11/23/53 "

Crisuck, Lucy 1926 Lives off
Georgeanna M.
Margaret Sue 1/48
John 1/13/54 "

(Bentley) Crisuck, Nancy W. 1913 Enrolled in Canadian Lumbus
Myrtle L. 1/20/31 "
Christine V 10/1/1942 Enrolled "
Dorothy M 1/17/1945 "
Debra 1/3/48 "
Albert 2/24/1 "
Carolyn 2/16/1 "
Nancy Jo 9/2 2/5 "
Ronald Wade 2/14/1 "

Fort-Sherman
9 9 [illegible]

Patterson) Cusick	Lynn Julia	1918		
Patterson	Ivy G	1901		
	Robert N.	42		
	Ida	"		
	James Walter	46		
Cusick	Simon	98		
	Webster Sr.	83	died	
	Benson	1931		
	Ralph Avery	1934		
	Webster Jr.	1929		
Cusick	Hulbert Jr.	39		
Cusick	Simon	117		
Daire	Adelaide	130		
	Arthur Dewey II	148		
	Andrew Frank	2/3/30		
	Allen Michael	Oct 1/54		
	Allison M	12/31/56		
Decker	Carlisa	1926		
Dougherty	Audrey L	1920		
	Kenneth A.	1941		
	Donna Eileen	1947		
Duncan	Charlotte	11	died	

Dorlester	Daniel	1902	came off
Dubyc	Sally C.	1917	came on
	Jerome	35	
	Lena	38	
	Martha J.	41	
	Mary M J	43	"
	Agnes Angeline	45	"
	Michael Stephen	47	"
	Justine Pamela	8/1/50	"
	Maureen A.	Apr. 27/52	"
Farnham	Carrie G.	1895	died
	Burton	25	came on
	Thomas	22	died
	Barbara	35	died
Farnham	William	33	came on with
	Rose A.	33	"
	Nancy		"
	William Jr.	12/13/56	"
	Edward Eliot	Apr/27/58	"
Fish	Laurence H.	10/25/27	came on with
	& Clara wife		"
	Karen Ralph	10/2/54	"
	Sharon Elaine	4/27/58	"
Fish	Lillian H.	1898	
Frey	Hazel M	1908	came off
	Elmer D. "	1931	"

(Allen)	Frey	Viola L.	1929	Lives off
		Kathleen Patricia		
		Sharyln Lynn		
		Laura M.		
	Yarnworth	Albert	1922	lives on [illegible]
	Yarnworth	Beatrice	1890	" "
	Yarnworth	Elmer D. Jr.	1924	lives off [illegible]
		Irene W.	1898	
		Raymond	20	
		Lamont H.	27	
		Roxaine G.	37	
(Dowe)		Jane Louise	1933	lives off
		Bruce Wayne	Twin sister	
	Yarnworth	John H.	1904	lives on [illegible]
		Nellie	1888	"
	Darlow	Andrew	1863	dead
		Henry	1864	dead
	Darlow	Hereford	1891	lives off
	Green	Alice	1900	lives off [illegible]
		Louis Jr.	1902	"

Green,	John J.	1891		Lives off - works off
	Elton E.	Oct 3/84		Lives on - retired
	Ralph E.	5/26/44		Lives off - works off
	Connie	84		
Green,	Emma	1920	Enrolled in	Canada
	Earl C. son	40		
(Mrs.) Green,	Eulila	1926		Lives off - unemployed
	Janice Mae	5/26/49		" "
	Loreen	Aug 31/57		" "
	Loren G.	5/2/24		" "
Green,	Geo. C.	1891	died	
	Leander	1882	died	
	Leslie	1908		Lives off - works off
	Owen	Aug 27/03		Lives on
(Wilson) Green,	Rachel	1912	joined	Canada
Green,	Beatrice A.	1931		Lives off
(Gibson) Green,	Rhea	1/12/28		Lives off - unemployed
	Valerie Alice	4/5/49		" "
	Bradley Ray	10/24/51		" "

Grow, William 1911
Maybelle B. wife 1913 dead
Barbara M. 1937 Lives off
William Jr. 1939 "
Carolyn 1941 "

(Robinson) Grow, Dean 1935 Lives off
Margo Ann daau 5/13/56 "

Hamilton, Mae G. 1925 lives off
Heffner, Fritz 1909 "
Henry, Eli 1872 dead
Henry, Francis R. 1929 lives on route
Carolyn wife 1931 "
Raymond "
Brian "

Harrison M. 1920
Noah Feb 22/1893 " deceased
Louise wife 1908 " lives on
Gary L. son 1943 "
Leo R. son 1931 "

Henry, Timothy 1875 dead

Hewett,	Arnold K.	1918	lives on
	Betty J. wife	1928	
	Rosalind Jane	1947	
	Deanna Christine	1/14/48	"
	Susan Beta	3/21/53	"
Hewett,	Calvin D.	1916	lives on
(Howard) Hewett,	Clemence	Aug 12/28	lives off
	Faye	Sept 3/46	"
	Florence	Feb 20/49	"
	Robert	1/21/48	"
(Wm.	Livian Deane	Feb 12/42	"
Hewett,	Edward	July 23/1893	lives on and off
	Avis P.	1914	lives off
	Benito	1935	"
(Flynn) Hewett,	Delores	1924	lives on
	Judith Ann	1944	
	Frances Jean	1945	
	Ralph Leslie	"	
	Sandra Kay	1/1/49	
	Carol Lee	12/31/50	
	Cathy Marie	6/7/54	
	Robert Joseph	Mar 27/56	
Hewett,	Everett H.	May 30/20	lives on - works off
Hewitt,	Silas	1907	lives on - works off
	Viola	1907	"
	Alvis D.	1931	"
	John A.	1933	"
	Franklin	1936	"
	Arlene	1930	lives off

(Fischer) Hewitt,	Patricia	1935	lives ex
	Jerrie Lynn	3/27/56	"
	Eldon McClain	Aug 5/57	"
Hewitt,	Wilkinson P	1896	lives/ex - work off
	Laura	1896	"
Jonathon,	Lurdina	1935	"
	Lori Ann	1/19/55	"
	Tom Edward	1/24/57	"
Hill,	Eunice	1912	lives on
Anderson,	William C. ex	1942	"
Hill,	Elizabeth Pearl dau	1947	"
	James Harvey Jr.	1948	"
	Randolph	7/4/49	"
	Melissa Ann	5/9/50	"
	Nancy Jo	10/7/51	"
Hill,	Matilda	1894	lives on
Hill,	John J.	7/4/920	lives on - work off
Hill,	Emily	1885	"
Hill	Juetta	1886	" - works on
Hill,	Larry L.		lives on
	Daniel J.		"
	Danielle B.		"
Holt,	Mary Louise (Hoss)		lives off

(Smith) Hill, Elaine			lives on
Smith, Billy		6/15/57	"
, Ronald		6/6/58	"
Hauser, Ira P.		1913	lives on - works off
, Debora B.		1932	" "
(Norwich), Betty J.		1933	lives off
Norwich, Paula Jo		6/25/58	"
Hunter, Caroline		1911	lives off
Ireland, Henrietta P.		1905	"
(Bonosky) Ireland, Irma Belle		5-24-23	lives off
Marlene Frances		Aug 3/55	"
Debra Ann		Apr 21/52	"
Isaac, Thomas		1879	died
Jack, Donald		1912	lives on - works off
Jack, Warren		1816	died
Jacobs, Caroline		1880	died
Jacobs, Wilson		1911	lives on - works off
Jacobs, Lovina		4/26/08	"
Jacobs, Leonard		1903	died
Jacobs, Samuel		1917	lives on - works off

Johnson, Janice M. 1928 lives off

Johnson, Gilbert 1878 dead

Johnson, Glenworth 1923 died

Johnson, Martin 1893 lives on - works off
, Mildred 1901 "
, Frances L. 1939 "

Johnson, Martin Jr. 1918 lives on - works off

Johnson, Matthew 1869 died Oct 30/49

Johnson, Nellie A. 1888 lives off

Johnson, Seymour Sr. 1892 lives on - work offs

Johnson, Tracy J. 1917 " "
Norma J. 1921 "
Tracy Jr. 1940 "
Crandell 1941 "
Ross 8/4/1950 "

Johnson, Truman D. 1901 lives on - works on

Jones, Adolphus Feb 3 1912 lives on - works off
William E. 1909 lives off
, Horace 1889 lives on - retired

EXHIBIT

Kulik	, Marcia P.	1922	lives off
	Karen Lucille	1947	"
	Janice	10/21/50	"
	John Thomas	Oct. 22/57	"
	Bruce Clemens	Aug. 7/57	"
Lawler	, Irene	1915	lives on
Lederhouse	, Albert	1919	lives off
	, Chester	1912	"
	, Phoebe	1894	"
Marsh	, Estella J.	1896	"
	, Phyllis D.	1932	"
Marcelo	, Elmira E.	1907	lives on
	, Sonya	1936	"
	Sandy	1943	"
Miller	, Albert G.	1928.	lives off
	Grace W.	1905	lives on
(Ressler)	, Gloria	1935	lives off

(Martin) Miller,	Nama H.	1930	Lives off
	William Elias	2/22/50	"
	Frances Grace	3/30/51	"
	John Dewey	Nov 13/54	"
	Sheridan	12/18/58	"
	Thomas Ryan	July 12/58	"
Mt Pleasant,	Elton	1916	Lives on ward off
	Lucille M	1922	Lives off
	Douglas	1942	Lives on
	April S.	1944	off
	Alfred	3/11/48	off
Mt Pleasant,	Clinton	1898	on - works on
McPleasant,	Edsan	1919	Lives on - works off
	Elize R.	1922	"
	Clara M.	1941	"
	Melinda R.	1943	"
	Edsan P.	1946	"
Mt Pleasant,	Elmer Sr	1892	"
	Alberta	1893	"
	Elmer Jr	1915	"
Mt Pleasant,	Grant L.	1930	dead

Exhibit 210 8164

Mt Pleasant,	Houghton L.	1930	lives on unit
	anette	1934	"
	Mona Lee Jill	1/27/56	"
	Jeffrey Rose	2/12/57	"

Mt Pleasant	, Hamilton	1896	Living in 1941
	, Odella K.	1903	
	, Ann Ruth	1933	"
	, Ronald	1936	"
	, Minerva	1939	"
	, Louise	1941	"
(Wagner)	, Elsie	1932	"
(Chapeler)	, Pauline	1935	Living 1941
Chapeler	, Joseph Hamilton	Sept 3/1958	"
Mt Pleasant	, Howard	1922	Living in 1946
	, Leighton L.	1930	(listed with wife & family)
Mt Pleasant	, Mary F.	1920	Living in
	, Martha L.	1942	"
	, Roger T.	1944	"
	, Charlene	1945	"
	, Alberta Sally	1946	"
	, Thomas Burton	1948	"
	, James	7/2/52	"
	, Roxanne	10/2/51	"
	, Cleham		"

(Jacobs) Mt Pleasant, Carrie V. 1939 issue on
Jacobs, Stanley Philip Jr. 6/22/57 "

Mt Pleasant, Maurice 1927 " cancelled off
Eugene 1927 "
, Joyce Ann 7/13/49 "
, Randy Paul 9/23/51 "
Gerry "

Mt Pleasant, William 1883 died
, William J. 1918 Name on tomb stone

Nichols, Lucille 1925 "
Robert Kent Aug 16/57 "

Patterson, Clarence 1910 Name off

Patterson, ~~Edward~~ Eleanor ~~1876~~ 1910 Name on
, Myron 1932 "
, Stewart age 21/34 " cancelled off
, Norman 1938 "
, Sarah G 1941 "
, Kathleen M. 1943 "
, Priscilla 1944 "
, Percy Peter 1946 "

(Best) Patterson, Beatrice 1930 "
Francene "

Patterson,	Franklin	1920	Lives on [illegible]
,	Isabelle	1916	
,	Myrtle K.	1913	
,	Franklin Jr.	1944	
,	Neil	9/27/49	
,	Susan Mary	9/24/52	
Patterson,	Harry	1873	[illegible]
,	Barbara	1884	
,	David	1916	
,	Donald E.	1931	
,	Kenneth	1927	
,	~~Lucinda~~ Edna	1918	
Patterson	, Lucinda	1928	
,	Judith	1937	
,	Lucinda Jr.	May 19/57	
Patterson	, Harry J	1910	died
Patterson	, Sterling	1898	Lives [illegible]
,	Alta	1898	
,	Walter K.	1933	
,	Sterling Jr.	1925	Lives off
,	Joan E.	1930	Lives on
,	Leah M.	1928	Lives off
,	Gary O.	1927	Lives on

Pemberton,	Harriet	1893	Lives on
	John W.	1907	Lives off
	Minona	1912	Lives on
	Kay L. dau	1942	"
Peters,	Irene	1903	died
Prentup,	Abraham	1894	Lives on
	Lou Verna	1901	"
(Lowenberg) Prentup,	Alberta	1916	Lives off
	Cinderella	1885	Lives on
	Herbert L.	1907	Lives off
	Laurence A.	1912	Lives off
Prentup,	Alvin Sr.	Jan 11/1888	Lives on
	Minnie	Nov 22/1890	
	Clinton	1931	"
	Alvin Jr.	1930	"
	Gladwin	1922	Lives off
	Harrison	1929	Lives on
	Farrell K.	1926	"
	Marshall	Nov 11/1924	"
	Hattie Allen Sr.	1914	"
Prentup,	Emmett K.	1939	Lives on
	Roberta	1941	"
	Mona D.	1942	"
Prentup,	Cornelius	1870	"
	Abigail	Sept-19/1889	"

[Hudson) Prentice	Doris B.	1913	"	wife of
Prentice	Ewen son	1932	"	wife of
	Clifford	1938	"	wife of
	Mary L.	1939	"	
	Helen	1940	"	
	Cyril P.	1941	"	
	Sunny L.	1942	"	
	Dennis	1944	"	
	Theodore Johnson	1946	"	
	Fanny	4/24/1910	"	
Hudson	Susan	12/25/53	"	
Hudson	Penny Dorelyn	11/5/56	"	
[Jacobs) Prentice	Harriet Deanne	1937	"	
	Cindy Lou		"	
	Elwood W.		"	
	Dora Ellen	Nov 3/56	"	
[Sharrow) Prentice	Cora	1935	"	
	Lana Jean	Sept 1/57	"	
Prentice	John	1933	"	
	Jacqueline	1935	"	
	Leslie Wade son	July 26/56	"	works on
	Lucas Earl dau	Jul 25/58	"	

Prentiss	Jonathan Jr. II		1920	lives on with off
	Margaret		1927	"
	John Jr. III		3/10/52	"
	Randall R.		Aug 31/55	"
Prentiss	Vincent		1918	lives off - work off
	Nellie M.		1922	" "
Prentiss	Natalie A.		1895	lives on
	Willis		1935	"
	Deanna		1938	"
	Kenneth		1923	" works off
	Laura F.		1920	" "
(Hoyt)	Lydia J.		1930	"
Prentiss	Mamie G.	Act 1/1894		"
(Karol)	Mamie G.		1938	lives off
Karol	Susan Veronica		8/23/57	"
Prentiss	Murray A.		1918	lives on worked off
	Dorothy		1918	"
	Dorothy M.	dau	1943	"
	Murray Edw.		10/4/54	"
Prentiss	Porter		1906	" "
	Whitcomb		1900	" "
Prentiss	Melton		1908	dead

Reed, Lucinda D.		1899	lives on welfare
, Cecil	son	1925	" work off
, Leona		1934	" "
, Claudia		1936	" "
Rice, Ethelyn (Ethelene)		11/12/22	lives on
, Elaine		1943	"
, Edwin J.		1944	"
, Joyce Ann		1946	"
, Donald Robert		1948	"
, Alice Marie		8/26/53	"
Rickard, Amy P.		1909	lives on
, Florence	dau	1933	" work off
Rickard, Chester		1883	lives on - retired
Rickard, Clenton		1881	" "
, Beulah M.	wife	1911	"
, William C.		1917	" work off
, Clark		1921	"
, Beverly		1935	"
, Omalee		1936	"
, Karen		1938	"
, Enid	dau	1940	"
, Norton		1942	"
, Lois		1946	"
, Eli L.		1959	Custody with family
Rickard, Edgar		1879	died
Rickard, Melvin		1911	lives on work off
, Arlene M.		1912	"
, Melvin Jr.		1936	" "
, James B.		1939	"
Russell, Viola J.		1947	died

Packard	, Margaret	1926		Lives on
	, Kenneth G Jr	1944		"
	, Arnold Regan	1947		"
	, Ruth	1948		"
	, Gerald	Aug 3/51		"
	, Rosemary Louise	11/30/53		"
	, Ellen Joyce	5/21/57		"
Rowles	, Rita J.	1927	died	9/3/52
	, Hilliard Ardell	4/17/49		Lives off
Scruten	, Byron H.	1928		"
Schimmelman	, Elsie J.	1905		Lives on
(King)	, Jacqueline dau	1930		"
	, Marie	11/3/49		"
	, Gwendolyn	7/23/51		"
Skye	, Evangeline	1925		"
	, Vaugh Lance	1948		"
	, Jeffrey Adrian	12/27/50		"
	, Milton	6/19/52		"
	, Gregory McIlhata	7/21/53		"
	, Lenard Wade	11/13/54		"
	, Robert			"
Smith	, Arthur	1889		Lives on with [illegible]
Smith	, Daniel	1874	died	
(Miles) Smith	, Donna M.	1911		Lives off
	, Leroy J.	1876		"

Smith	, Hattie	6/18/08	[illegible]
Spendley	, George E.	1929	Miss [illegible]
	, Raymond C.	1925	
	, Sano Sami	1902	
	, Franklin	1932	
Sylvester	, Charles H.	1916	
	, David	1938	
	, Oscar	1881	Lives [illegible]
Tallichief	, Allen B.	1908	Lives [illegible]
	, Chester	1910	
	, Geraldine	1917	
Thompson	, Grover C.	Feb 1/1851	Lives [illegible]
	, Sophronia	1867	died Dec 20/[illegible]
Wegerski	, Sylvia	1926	Lives on
	Roger Walter	1946	
	Wendy Wayne	1/24/63	
Wilkerson	, Ray Jr.	1900	Lives [illegible]
	, Willie III	1892	
Williams	, Alfred	1900	Lives on [illegible]
Williams	H. Clemmons	1918	Lives [illegible]
	, Vivian D. dau	1942	
Williams	, Harold	1929	[illegible]

Graham 210 9174

	Matthews	E. Augusta	1877	Leave on
		Amelia C	1896	"
		Theodore	1930	Leave off
Lehberg		Freda		Leave off
		Shirley Stuart	Oct 9/57	"
	Matthews	Minnie	1890	dead
	Matthews	Walter B	1911	Leave on
Whitford		Donna	1936	
		Ann Marie	6/29/53	
		Martha Gail	9/10/56	"
		Ellen Jayne	May 9/57	"
Wescott		Nadine	1938	"
		Sandra Faye	10/57	"
		Ramona	1940	"
Morgan	the Great	Jean E.	1911	"
		Kathy Edwina	Nov 9/57	"

Woodbury	Gladys E.	1910	Lives on route
	Lena E.	1935	"
Woodbury	Joseph	1930	
	Mary wife		
	Joseph Harold jr.	Feb 21/56	"
	Mary E Lyttatt	May 8/58	"
Jamont	Ethel	1922	
	Nelson E.	1914	"
	Walter Francis jr.	1947	
Herdt	Marion L.		Lives at
Lee	Marshall C		"
Snider	Bryant William		"
	Ralph Earl	12/17/1	"
	Lorrice Kathy	4/5/54	"

Exhibit 210 8176

Cayuga's Roll (Cayugas and Senecas living on Tuscarora)

Mt Pleasant	Lulah	1915	Born on
Williams	Carol S	1918	"
Mt Pleasant	Patricia S	1921	"
	Marie Jean	1946	"
Seneca	Joseph	1921	Born off reservation

Exhibit 210 8177

Creeda Roll (residing on Tuscarora Res.)

Higdon	, Lula	1919	Lives on
	, Hilliam "Sr"		"
Williams	, Gerald and B.	1909	Lives off
Rickard	, Lula C.	1882	Lives on
(Jarrell)	, Marjorie	1917	Lives off
	, Patricia	1916	"
Rickard	, Verona	1920	"
	, Stella	1939	Lives on
	, Leo A.	1941	Lives off
	, Thomas H.	1942	"
Sayer	, Leroy R.	1917	Lives on
Dillon	, Kenneth	1939	Lives off
	, Edward H.	1912	"
	Norman III.	1942	"
Sawyer	, Edward	1945	Lives on
	, Sheila Dawn	6/22/49	"

Onondaga Roll (residing on St Lawrence Res

Cusick,	Charles	1877	died
Cusick,	Blanche	1918	lives on
	Frederick	1938	"
	William Andrew	10/6/53	"
	Janet Cecile	10/6/55	"
Hanswerth,	Elizabeth	1/31/16	"
	John	3/24/31	"
	Wayne	7/3/42	"
	Darcy Ann		"
Hanswerth,	Elmer Sr.	1844	lives off
Hanswerth,	Luella	1923	lives on
	Hazel R	1947	"
	Jayne Elizabeth	3/1/50	"
	Bruce Albert	1948	"
	Holly	12/26/51	"
	Lee Howard	3/2/23	"
Parlow,	Alfred	1903	lives on res.
	Alice	1901	lives off
	Claude	7/2/91	died 3/24/49
	Hetzel	1882	died Aug 16/48
	Phillip	7 Mar 13/54	lives on res.
	William	1858	died

Onondaga Roll (residing on Tuscarora Reserve)

Green,	Florence M.	1893	lives on
	Jonas	1867	dead
Hill,	Edith L.	1925	Newark N.Y
	Gertrude P	1903	lives on
	Howard E	1902	" lives off
	Roberta J.	1927	lives off
Ihle,	Alice M.	1914	lives off
Johnson,	Edna R.	1894	lives on
	Hector	1917	"
	Seymour Jr.	1919	"
(Nelson)	Charlie	1932	"
	Valerie Rae	2/2/50	"
	Dallas James	11/21/51	"
	Corine		"
	Keven	Nov 10/56	"
	Janelle		"
Johnson,	Kilero O.	1923	"
	Marlen M.	1945	"
	Lana June	1947	"
	Daphne Ann	4/10/49	"
Johnson,	Ley man	1893	lives off
McDermott,	Nelson	1893	lives on - retired

Exhibit 210 8180

Onondaga Reel (illegible)

Patterson,	Bert	1896	dead
Potter,	Edward	1927	dead 12/24/40
	Frances	1938	
	Martha S.	1902	
	Alfred	1932	
Prentiss,	Lauel	1876	dead
Prentiss,	Marjorie I.	1920	living
	Walter A Jr	1943	"
	Marlin	9/10/48	"
Rickard,	Fillmore	1901	"
	Simpson	1905	"
Stickl,	Phoebe	1870	living
Thompson,	Flora	1918	"
	James	1914	"
Williams,	Alma L.	1921	living
	Alfred G.	1942	"
	Lynn A	1943	"
	Lelia Rae	1947	"
	Neil	Feb 23/54	"

Seneca Falls

Dilly	Kathleen	1916	
	Margaret A.	1941	
	Kenna K.	1943	
[illegible]	Elsie	1908	dec
Darlow	Ruth	1914	
	Laura B	1943	
	Martha Caroline	1947	"
	Philip Charles	1949	"
Darlow	Mildred F.	1890	"
Henry	Amelia	1895	dec
	Ernest A.	1919	"
Jack	Laurie	1918	dec
	Patricia M.	1942	"
	Cynthia A.	1943	"
	Frances E.	1947	"
	Elaine		"
	Donald		"

Seneca Roll / Seneca w/ Issues

Johnson,	Marcus	1919	Issues
	Marilyn	1941	
	Kate O.	1941	
	Mari Garfield	1/23/	
Martinez,	Glenna	1921	
Garlow,	Elizabeth	1936	
Martinez,	Beverly A.	1941	
	Maxwell F.	1944	
	Richard	6/2/49	
Trombley,	Phyllis	1923	
Chino,	Adria Pamela	1918	Issues

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

September 30, 1957

Dear Mr. Kuykendall:

This is in reply to the Commission's letter of August 27 requesting our comments on the application of the Power Authority of the State of New York for a license for proposed Niagara Project, No. 2216. The proposed project consists of an intake structure located about 3 miles above the falls; two covered conduits about 4.5 miles long extending from the intake and around the falls to a pumping-generating plant and reservoir in the Town of Lewiston; a step-up substation; a pumped storage reservoir having a capacity of 60,000 acre-feet with maximum water surface at elevation 645 feet; a concrete lined open canal about one mile long from the pumping-generating plant and reservoir to the main Lewiston power plant consisting of an intake structure with head gates, forebay and penstocks leading to the Lewiston generating plant with an installation of thirteen 200,000 horsepower turbines, each direct-connected to 150,000 kilowatt generators; a step-up substation; a switchyard; 230 kilovolt feeder lines between Lewiston powerhouse and switchyard; and appurtenant mechanical and electrical facilities.

The U. S. Fish and Wildlife Service advises as follows:

> The Niagara River is the scene of extensive utilization of major fish and waterfowl resources. These resources consist of large numbers of wintering and migrating waterfowl concentrating along the upper river above the falls and excellent game-fish waters both in the upper and lower rivers. Many hunters and a large number of fishermen utilize these resources. Wildlife values other than waterfowl may be considered of minor importance within the area which will be affected by power development.

As a result of studies carried out within the area by Service and New York State personnel, it can be conservatively estimated that at least 345,000 fisherman hours are expended annually on the river. Fishing pressure in the upper river is directed primarily towards smallmouthed bass. However, other species including muskellunge, yellow perch, blue walleye, and yellow

| 5692

walleye, are also taken. Much of this fishery is conducted from boats, but many shore fishermen utilize accessible areas.

In the lower river, boat fishing for blue walleye, yellow walleye, and other species is conducted from the Lewiston Bridge to the mouth of the river. Above the Lewiston Bridge, within the gorge area, boat fishing is not practiced because of river turbulence. In this reach bank fishing is conducted by hook and line anglers and spear fishermen in pursuit of blue walleye, yellow walleye, sturgeon, yellow perch, and silver bass. From February through May of each year smelt "dipping" is popular in the vicinity of Lewiston Bridge. In addition, the gorge area probably comprises spawning grounds for several fish species.

The upper river is an important waterfowl area. Reliable estimates indicate that about 250,000 migrating waterfowl visit the area for resting and feeding each year, making it an important unit of the Atlantic Flyway. This area is also utilized by large numbers of wintering waterfowl, with at least 20,000 having been observed at one time. During the open season on migratory game birds, 93 duck hunters have been counted in the area in one day

Construction of power-generating facilities and related works, as proposed, will not have serious effects on fish and waterfowl resources. The section of the river which will be most affected by the project is that from the Chippewa-Grass Island Pool control structure to the Lewiston power plant site. Although access is difficult and conditions are at times hazardous, this area is frequented by fishermen both day and night. Every effort should be made to protect the existing lower gorge sport fishing and, through warning devices and the control of stream flow releases, provide for the safety of fishermen. A fishway will not be necessary since no project structures will act as a barrier to fish movements.

To protect, insofar as possible, the sport fishery of the area affected by the project, the U. S. Fish and Wildlife Service requests the following proposed special stipulations for inclusion in any license for this project:

[5693]

1. The Licensee shall construct, operate and maintain such protective devices and comply with such reasonable modifications in project structures and operation in the interest of fish and wildlife resources as may be prescribed hereafter by the Commission upon the recommendations of the Secretary of the Interior and the New York State Division of Fish and Game.

2. The Licensee shall operate the proposed Lewiston generating plant in such manner that water level changes in the lower Niagara River will not be abrupt, resulting in surges of water hazardous to human life.

3. The Licensee shall erect a warning system consisting of audible signals and warning signs wherever water level fluctuations resulting from project operations may endanger human life, and shall operate the audible signals sufficiently in advance of water level changes so as to safeguard human life.

The opportunity of commenting on this application is appreciated

Sincerely yours,

s Fred G. Aandahl

Assistant Secretary of the Interior

Hon. Jerome K. Kuykendall
Chairman
Federal Power Commission
Washington 25, D. C.

[5706]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

November 1, 1957

Dear Mr. Kuykendall:

Enclosed is a copy of an undated communication addressed to the President, to the Secretary of the Interior, and to the Federal Power Commission, which is signed by several Tuscarora Indian Chiefs. The original was received in this office on September 30, 1957, and we assumed that a duplicate original or that a copy had been mailed to you by the Indians. Mr. Easley of your organization advises us, however, that this was not the case and we are therefore sending this copy.

Also enclosed is a copy of our reply to the Indians, which is self-explanatory. We recommend that the Federal Power Commission

consider the Government's obligation under the 1794 Treaty when it acts on the pending license application.

Sincerely yours,

/s/ Fred G. Aandahl

Assistant Secretary of the Interior

Hon. Jerome K. Kuykendall
Chairman, Federal Power Commission
Washington 25, D. C.

Enclosures 2

[5707]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

November 1, 1957

Dear Mr. Patterson:

This will supplement our letter to you dated October 11, 1957, regarding the plan of the Power Authority of the State of New York to acquire a part of the Tuscarora Indian Reservation for a storage reservoir.

The New York State Power Authority has informed us that the reservoir will cover about 2,400 acres in the town of Lewiston, New York, and that approximately 900 of these acres are in the Tuscarora Reservation.

The reservoir is a part of the Niagara Power Project, which was licensed by the Federal Power Commission in accordance with a direction from Congress to authorize the construction of a power project capable of utilizing all of the United States' share of the Niagara River permitted to be used by international agreement (Act of August 21, 1957, 71 Stat. 401).

We are unable to determine without examining the land title records whether the lands needed by the New York State Power Authority

are a part of the lands covered by the 1794 Treaty with the Six Nations (7 Stat. 44). In that treaty the United States acknowledged the Indian ownership of certain lands, and agreed not to disturb the Indians in the free use and enjoyment of the lands. The treaty also provided that the lands would "remain theirs [the Indians'], until they choose to sell the same to the people of the United States, who have the right to purchase." If it is assumed that the treaty applies to the lands in question it is still not clear whether the treaty would be interpreted in the light of present day circumstances as a prohibition against the acquisition of the Indian lands by condemnation, which is a form of purchase. It is also not clear whether the 1957 statute under which the Niagara Power Project is licensed would be interpreted as a statutory exception to the treaty provision if it is applicable.

Since the treaty was made, all Indians born in the United States have been made citizens of the United States and of the State where they reside. All citizens are entitled to the use and enjoyment of their privately owned lands, and normally they cannot be required to sell their lands unless the lands are needed for some public purpose. In that event, however, the lands are subject to

[5708]

condemnation for the public purpose and the owner is paid their fair market value. This is an obligation that attaches to all citizens and persons who enjoy the benefits of our form of government.

If the Tuscarora Indians feel that their lands are not subject to condemnation under the rules applicable to other citizens, two alternatives are available.

1. The first alternative is to ask the Federal Power Commission to modify the license issued to the New York State Power Authority in a manner that requires the reservoir to be located entirely on non-Indian land. This request would be based upon the contention that the 1794 Treaty

precludes the United States Government from taking any action that would disturb the Indians in the use of their land, and that the 1957 statute directing the Federal Power Commission to issue a license for the Niagara Power Project was not intended to abrogate the treaty if any site other than the Indian land is a feasible location for the reservoir.

We have forwarded your recent communication to the Federal Power Commission and have asked that it be considered in the licensing proceeding that is now pending. If you wish to press your case, however, it will be necessary for you to send a representative to appear before the Commission and present your legal argument. That appearance should be made immediately because the hearing is now in process. As your reservation lands are under State jurisdiction, this Department is not in a position to present your case for you.

2. The second alternative is to contest in court any effort of the New York State Power Authority to condemn your land. This means litigation, of course, and the outcome of any litigation is always uncertain. You might therefore want to consider the advantages of negotiating with the New York State Power Authority for the sale of the land in question and for the purchase of substitute land for the Indians if it is needed.

We hope that this letter will be of assistance to you.

Sincerely yours,

s Fred G. Aandahl

Assistant Secretary of the Interior

Mr. Harry G. Patterson
Council of the Tuscarora Nation
Sanborn, New York

Exhibit 212 8192

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[Received Nov. 1, 1957, F.P.C.] [5709]

TO HIS EXCELLENCY, DWIGHT D. EISENHOWER,
President of the United States of America

THE HONORABLE FRED A. SEATON,
Secretary of the Interior

THE HONORABLE JEROME K. KUYKENDALL,
Chairman, Federal Power Commission

WE, the undersigned representative Chiefs of the TUSCARORA INDIAN NATION, under existing treaties with the Federal Government, Known as the TUSCARORA INDIAN NATION, is a self-governing body under which all reservations and all transactions are in the control of the Chiefs who are appointed by selection and lineage of the clan according to customs and Iroquois laws.

The Tuscaroras were adopted as one of the SIX NATIONS CONFEDERACY before the Revolution and have lived on our present lands, northeast of Niagara Falls since 1780. These consist of about ten square miles, titles to the northerly three square miles came to them by gift from the SENECAS, one square mile by deed registered in Niagara County, Lockport, New York, and two square miles from the Holland Land Company. The Tuscaroras purchased the remainder from the Company mentioned above a few years later with money received from the sale of our own lands in North Carolina. Title to the purchased lands was originally taken by the Secretary of War (Henry Dearborn) and he deeded the fee title to the Tuscarora Nation totaling 6,249 acres.

WE, THEREFORE, PROTEST the attempt by the NEW YORK STATE POWER AUTHORITY to take several hundred acres of our Tuscarora Indian lands for storage reservoir.

[5710]

We have lost enough lands in time past, we want to keep what little land we possess. We have adopted the following resolution:

WHEREAS, the TUSCARORA NATION, recognized as a nation by the Federal Government, has now valid existing treaties with the United States, having received the Indians with their protection and assured the said Indians their lands. - Treaties of 1794, Art. 1 and 1784 - 1789, declaring the same to be perpetual.

NOW, THEREFORE, BE IT RESOLVED, that WE, THE TUSCARORAS, protest any encroachment upon our Tuscarora lands by the said NEW YORK STATE POWER AUTHORITY. We hold sacred to our hearts the small Reservation we have left in our possession.

WE, THEREFORE, desire to be left alone and undisturbed according to the Treaties of 1794, Art. 4 in part, the United States having thus described and acknowledged what lands belong to the ONEIDAS, ONONDAGAS, CAYUGAS and SENECAS and engaged never to claim the same, nor to disturb them or any of the SIX NATIONS or their Indian friends residing thereon, now united with them in free use and enjoyment thereof.

SIGNED BY THE MAJORITY OF CHIEFS OF THE TUSCARORA INDIAN NATION.

s Chief Arnold Hewitt
Chief John J. Hill
Chief Walter A. Printup
Chief David Patterson
Chief Harry Patterson
Chief Elton Greene
Chief Edison P. Mt. Pleasant
Chief Tracy Johnson
Chief Noah Henry
Chief Kenneth Patterson
Chief Eleazer Williams

[5497]

Project No. 2216
Power Authority of the State of New York

September 12, 1956

Honorable Fred A. Seaton
Secretary of the Interior
Washington 25, D. C

Dear Mr. Secretary:

Power Authority of the State of New York, of New York City, New York, has filed with this Commission an application for a major license

for a proposed water-power project No. 2216, which would be located on Niagara River in Niagara County, New York, and would affect navigable waters of the United States.

The project is briefly described in the enclosed statement dated August 22, 1956.

A copy of the application with exhibits including reduced copies of maps and drawings is enclosed, and a set of negative photostatic copies of the following maps and drawings is being sent to you under separate cover:

Exhibit J (FPC No. 2216-6)

Exhibit K, Sheet 1 (FPC No. 2216-7)

Exhibit L, Sheets 1 through 12 (FPC Nos. 2216-8 to -19 incl.)

It is requested that you give the Commission your views as to the measures which should be taken to protect wildlife resources in connection with the project in accordance with the provisions of the act of August 14, 1946 (60 Stat. 1080). Your advice concerning fishways is also requested pursuant to the provisions of section 18 of the Federal Power Act, 16 U.S.C. 811.

You are also invited to report otherwise on the application to the extent that you may deem desirable.

It would be appreciated if your response is received within 90 days from the date of this letter or in the event it cannot be submitted within 90 days you so advise the Commission.

Very truly yours,

Leon M. Fuquay

Secretary

3 enclosures:

No. 110195 - One copy of application
No. 110196 - Statement dtd. 8-22-56
No. 110197 - 14 Negative photostats.

[5520]

Project No. 2216
Power Authority of the State of New York

October 2, 1956

Honorable Fred A. Seaton
Secretary of the Interior
Washington 25, D. C.

Dear Mr. Secretary:

This refers to the Commission's letter of September 12, 1956, transmitting a copy of the application for license for Project No. 2216 filed with this Commission by Power Authority of the State of New York. The applicant has supplemented its application by filing with this Commission an amendment to its original application.

A copy of the amendment to application of Power Authority of the State of New York is enclosed.

Very truly yours,
Leon M. Fuquay
Secretary

Enclosure No. 110269
One copy of Amendment to Application

LP
JAS:bac
9 27 56

cc: Secretary of Interior
New York Regional Office
Office of the General Counsel
Division of Licensed Projects

[5607]

Project No. 2216
Power Authority of the State of New York

August 27, 1957

Honorable Fred A. Seaton
Secretary of the Interior
Washington 25, D. C.

Dear Mr. Secretary:

In a letter dated September 12, 1956, you were requested to give

your views as to the measures which should be taken to protect fish and wildlife resources in connection with the proposed Niagara Project No. 2216 for which the Power Authority of the State of New York filed application for major license, and to report otherwise on the application to the extent you deemed desirable. In a letter dated October 5, 1956, the Acting Secretary of the Interior requested an extension to January 11, 1957 to submit the Department's views.

We have been advised that the Power Authority will in the very near future supplement its application to request that the license be issued under Public Law 85-159 approved August 21, 1957 (Niagara Redevelopment) as well as under the Federal Power Act, a copy of which supplement will be forwarded to you upon its receipt. However, it is understood that no substantial changes will be made in the physical features of the proposed project which do not include a dam but rather an intake works in the Niagara River for diversion purposes. The diversion of water from the Niagara River for the proposed project would be subject to the Niagara Treaty of 1950.

It will be appreciated if you will submit your report within 10 days from the date of this letter.

Very truly yours,
Michael J. Farrell
Acting Secretary

PWR
WRF djh
8 2. 5[illegible]

cc: Sec of Int
NYRO
OGC
DLP

COPY

Exhibit 213

Project No. 2216
Power Authority of the State of New York

November 17, 1958

Honorable Fred A. Seaton
Secretary of the Interior
Washington 25, D. C.

Dear Mr. Secretary:

As you know, the Federal Power Commission on January 30, 1958, issued a license to the Power Authority of the State of New York for redevelopment of the Niagara River in Niagara County, New York. The Tuscarora Indian Nation has objected to this license, although under date of November 1, 1957, Assistant Secretary Aandahl advised that the reservation lands were under State jurisdiction and therefore the Department of the Interior could not represent the Indians.

The United States Court of Appeals for the District of Columbia Circuit on November 14, 1958, remanded the Commission's license order for further study, finding that the Indian tribal lands of the Tuscarora are subject to the Commission's jurisdiction under Section 4 (e) of the Federal Power Act by reason of the guardianship of the United States over the Indians. The Commission is not in agreement with the court's interpretation and did not act on this premise in issuing the license. I am enclosing a copy of the court's opinion for your information.

In order to pass upon the matter in the light of the court's holding, the Commission would appreciate a report from you within the contemplation of Section 4 (e) of the Federal Power Act, stating what conditions you deem necessary for the adequate protection and utilization of the area involved lying within the Indian reservation. A hearing has been set upon the license authorization for Monday, November 24, 1958, and your report in time for prompt action will be appreciated.

Sincerely yours,

/s/ Arthur Kline

Acting Chairman

Enclosure No. 57991

COPY

Exhibit 214

8198

Project No. 2216
Power Authority of the State of New York

November 20, 1958

Honorable Fred A. Seaton
Secretary of the Interior
Department of the Interior
Washington 25, D. C.

Dear Mr. Secretary:

Reference is made to my letter dated November 17, 1958 concerning the application of the Power Authority of the State of New York for a license for the Niagara redevelopment, Project No. 2216, and transmitting a copy of the opinion of the United States Court of Appeals for the District of Columbia Circuit in relation to lands of the Tuscarora Indian Nation.

Transmitted herewith is a copy of petition filed November 20, 1958 by the Power Authority requesting certain information with respect to the Tuscarora which, according to the opinion of the Court, may be in your possession. It would be appreciated if the information requested in the enclosed petition could be supplied in time for the hearing fixed for November 24, 1958.

Sincerely yours,

/s/ Arthur Kline

Acting Chairman

Enclosure No. 98259

Exhibit 215

8199

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

NOV 21 9 39 AM '58

November 21, 1958

Dear Mr. Kuykendall:

This is in response to Acting Chairman Kline's letter of November 17 relative to Project 2216, Power Authority of the State of New York.

Mr. Kline's letter requests a report from this Department within the contemplation of Section 4(e) of the Federal Power Act stating what conditions are deemed necessary for the adequate protection and utilization of the area involved lying within the Tuscorora Reservation.

You are aware, of course, that in commenting to the Commission upon the pending application at an earlier stage of this case, this Department had proceeded under an assumption that the Tuscorora lands were not a "reservation" within the definition of that term as set forth in Section 3 of the Federal Power Act. Moreover, the Department has not, in fact, within recent years exercised supervisory control over the utilization by the Tribe of the Reservation lands.

Please be assured that this Department is proceeding at once to give the question of conditions its immediate attention. We hope that this Department--concurrently with the deliberations of the Commission on the issue of interference or inconsistency with the purpose for which the Tuscorora Reservation was created or acquired--will be in a position to advise you of the results of its review.

Sincerely yours,

Secretary of the Interior

Hon. Jerome K. Kuykendall, Chairman
Federal Power Commission
Washington 25, D. C.

NOV 24 1958

8200

Ex. 216

Exhibit 216

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

DEC - 3 1958

DEC - 3 1958

Dear Mr. Knykendall:

This refers to Acting Chairman Kline's letter of November 20 and Mr. Hobbs' inquiry of December 1 relative to project No. 2216, Power Authority of the State of New York.

Mr. Kline's letter transmits a copy of petition filed November 20, 1958, by the Power Authority of the State of New York and requests information with respect to the matters mentioned in the petition. The information is desired for use at the Commission's hearing which began November 24.

The petition indicates the following facts are desired: The number of members constituting the Tuscarora Nation, the number of members living on the reservation, the number of other Indians living on the reservation, the amount of reservation "allotted" to individual Indians and Indian families and all the facts tending to show the degree to which the reservation property is now used, who has a right to use it, the manner in which it is used, the amount of land which is needed for the purposes for which the reservation was established, the financial situation of the Nation and its members, and all other facts bearing upon the issues being considered at the hearing.

We have been advised by the Bureau of Indian Affairs that it does not have such information. In this regard reference is made to our letter of November 21, in which we stated the Department has not, in fact, within recent years exercised supervisory control over the utilization by the Tribe of the reservation lands. Specifically, we are advised that the Bureau has no information indicating the degree to which the reservation property is now used, who has a right to use it, nor the manner in which it is now used. We have been informed by the Bureau, however, that a roll of tribal members prepared for use in the distribution of the cloth annuity provided by the treaty of November 11, 1794, 7 Stat. 44, was furnished to the Power Authority on November 21. This roll was prepared as of July 1, 1949, the year in which the Bureau of Indian Affairs closed its New York Indian Agency. Since then the Bureau has compiled no information as to the number of tribal members.

Our observer at the hearing informs us that evidence pertaining to the foregoing matters has been introduced by the Power authority of the State of New York. Included in such evidence is the testimony of an official of the Census Bureau, subpoenaed by the Power Authority, relative to the number of Tuscaroras and other Indians, as well as the number of non-Indians, residing on the Tuscarora Reservation.

With respect to Mr. Hobbs' inquiry, it appears that the Tuscarora Indians are not subject to the Indian Reorganization Act, 48 Stat. 984. According to table A of Tribal Relations Pamphlet 1 entitled "Ten Years of Tribal Government under I.R.A.", United States Indian Service, 1947, the Tuscarora Indians voted against acceptance of the Act 132 to 6 on June 12, 1935.

Sincerely yours,

Acting Secretary of the Interior

Hon. Jerome K. Kuykendall, Chairman
Federal Power Commission
Washington 25, D. C.

Exhibit 217

COPY

COPY

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

December 19, 1958

Dear Mr. Kuykendall:

This refers further to our letter of November 21, 1958 concerning the issuance of a license to the Power Authority of the State of New York authorizing the Niagara River Power Project.

If our understanding of the recent opinion of the United States Court of Appeals for the District of Columbia Circuit, decided November 14, 1958, is correct, the Federal Power Act may be construed to require your Commission to make a finding, preliminary to the issuance of a license to the Power Authority of the State of New York, as to whether or not the proposed use of part of the lands of the Tusacrora Reservation for water storage can be made consistent with the purposes for which the reservation was created or acquired, taking into consideration the amount of land to be taken, the moving or replacement of buildings within the areas to be flooded, securing of adjacent lands for the use of the Indians and similar factors. The Court has clarified the function of this Department, as the agency of the Government charged with the management of Indian affairs, when they stated that "the relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States".

If the Court is correct in casting us in this role, we must carefully consider the circumstances surrounding any proposed use of the reservation lands to see that the Indians are satisfied that the purpose of the original acquisition of their reservation is not defeated. If the Commission finds that the proposal of the Power Authority includes provisions making it compatible with the purpose of the reservation then the Secretary of the Interior stands ready to advise in the fixing of compensation for the Indian tribe and to propose conditions necessary for the adequate protection and continued utilization of the reservation consistent with the reservation purpose.

In the meantime, we are continuing our efforts to assist the Tuscarora Indian Nation in reaching an amicable settlement with the New York Power Authority for the use of the area required under some agreement which would guarantee continuing ownership of the reservation lands to the Indians.

As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands. The Secretary of the Interior sympathizes with this contention of the tribe and will use every effort to protect their continuing ownership in the lands underlying the storage area and to make provision for lieu lands. The Department of the Interior, in insisting upon favorable consideration for the traditional interests and proprietary rights of the Indians in the lands involved, does not lose sight of the broad need of all the people of the State of New York to obtain the use of these Indian lands for the Niagara River Power Project.

Sincerely yours,

/s/ Elmer F. Bennett

Under Secretary of the Interior

Hon. Jerome K. Kuykendall
Chairman, Federal Power Commission
Washington 25, D. C.



SCHOELLKOPF PLANT JUNE 7, 1956

AS A RESULT OF THE DESTRUCTION IN 1956 OF THE SCHOELLKOPF POWER PLANT....THE NIAGARA AREA IS FACED WITH AN EMERGENCY

PROPOSED NEW NIAGARA POWERHOUSE

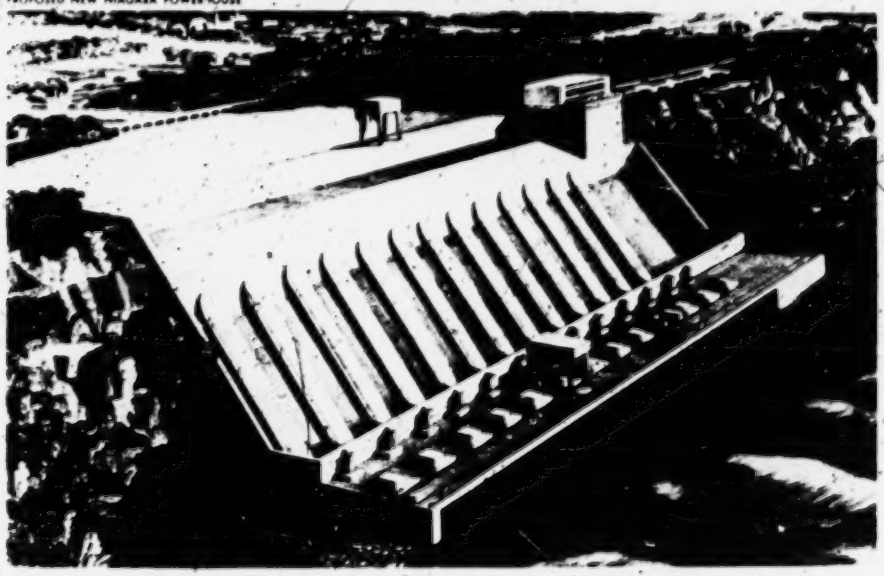


Exhibit 218 8205

NIAGARA POWER PROJECT

Location	
Water intake	Niagara Falls, N. Y.
Reservoir & Power houses	Lewiston, N. Y.
Main Power Plant	
13 Turbines (200,000 HP each)	2,600,000 HP
13 Generators (150,000 KW each)	1,950,000 KW
Head	309 Feet
Maximum Water Use	83,000 CFS
Pump-Storage Plant	
12 Pump-Generators (28,000 KW-20,000 KW each)	336,000 KW Pumping 240,000 KW Generating
Pump Capacity (3400 cfs. each)	40,400 CFS
Head for Generation	75 Feet
Reservoir	
Storage Capacity	60,000 Acre-Feet
Waterways	
Length	6 Miles
Capacity	83,000 CFS
Parkway	
Length	4 Miles
Estimated Cost	$ 15,000,000
Repayment of United States' share of cost of remedial works	$ 7,500,000
Average Flow Available for Power	
Daytime (April through October)	50,000 CFS
Night and Winter	75,000 CFS
Total Installed Capacity	2,190,000 KW
Dependable Capacity (17 hours a day)	1,800,000 KW
Estimated Cost of Project, including interest during construction	$600,000,000
Estimated Cost, including interest during construction, had project been built in 1950 when Treaty was signed	$385,000,000

Exhibit 218 8206

POWER AUTHORITY OF THE STATE OF NEW YORK

10 COLUMBUS CIRCLE
NEW YORK 19, N. Y.
TELEPHONE COLUMBUS 5-6510

TRUSTEES
ROBERT MOSES
CHAIRMAN
WILLIAM WILSON
VICE CHAIRMAN
JOHN E. BURTON
CHARLES POLETTI
A. THORNE HILLS

WILLIAM S. CHAPIN
GENERAL MANAGER
J. BURCH McMORRAN
CHIEF ENGINEER
THOMAS F. MOORE, JR.
GENERAL COUNSEL
HENRY B. TALIAFERRO
DIRECTOR OF
POWER UTILIZATION

To: The Members of the House of Representatives

Re: H. R. 8643, 85th Congress, 1st Session

A BILL

To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes.

H. R. 8643 is identical with the Niagara bill (S. 2406) reported out by the Senate Public Works Committee and introduced by Mr. Kerr on behalf of himself, Mr. Chavez, Mr. Ives, Mr. Javits, Mr. Kuchel and Mr. Case of South Dakota. The bill represents a good faith compromise worked out by men of divergent and even opposite views, cognizant of the extreme emergency facing the Niagara Frontier, in an effort to get the long delayed Niagara power project underway quickly.

All of the Niagara bills introduced at the present session of Congress provide for development by Power Authority of the State of New York. The only issues raised in this Congress with respect to the Niagara have dealt with the marketing of power and the only amendments to S. 2406 which have been proposed deal with the amount to be sold outside New York.

The Power Authority is a public corporation established by New York law. It has only two functions: (1) to develop the International Rapids Section of the St. Lawrence River for power, and (2) to develop Niagara Falls for power and to enhance and preserve its scenic beauty.

Subject to the paramount rights of the Federal government to regulate commerce because the two rivers are navigable streams and boundary waters, the state owns the beds of the rivers and the right to use their waters. This ownership has been repeatedly sustained by the Supreme Court. The State has authorized the Power Authority to exercise all of its rights in these waters and to develop power for the benefit of the people.

The Power Authority has no state or governmental credit of any kind. Unlike cities and counties it has no power to raise money by

levying taxes. It is a business organization under government auspices. It builds projects through money received from the sale of bonds to prudent investors who have confidence in the integrity of the people who direct it. W borrowed $335,000,000 to build the St. Lawrence project. In cooperation with our partners, The Hydro-Electric Power Commission of Ontario, we have more than half finished the St. Lawrence project and will produce power a year from this September.

On June 7, 1956, a large part of the Niagara Mohawk Power Corporation's Schoellkopf plant at Niagara Falls was destroyed by a rock slide and an emergency in the Niagara Falls area was thus created.

We have borrowed $825,000 from the state on an emergency basis and are carrying on preliminary surveys and engineering studies, making borings and doing design work which will enable us to let contracts for the Niagara project immediately upon receiving a license from the Federal Power Commission. We are now the only candidate for such a license and the Commission will grant one immediately if it gets a green light from Congress.

While the United States Court of Appeals has held that the Federal Power Commission has jurisdiction to issue a license under the Federal Power Act without further legislation, there is still time for an appeal to the Supreme Court. In the interval the Congress, of course, has the right to pass specific Niagara legislation if it sees fit. We strongly urge that it do so immediately to avoid further delay.

We ask the House of Representatives to act quickly on this bill and allow us to proceed promptly. The memorandum which follows is designed to answer objections which have been made to the bill. It shows that the bill provides for the disposition of Niagara power in a manner fair to the people of the Niagara Frontier; to the industry which long ago settled there because of the availability of low cost power and will be forced to leave unless cheap power is again made available; to the customers of municipal power systems and cooperatives within the project's economic market area; to the rural and domestic consumers otherwise served within that area; to neighboring states; and finally—because the bill provides that the power project is to bear the expense of preserving and enhancing the beauty of the Falls and because it will materially aid in the defense of the county—it is fair to the people of the United States as a whole. A true emergency endangering the economy of the Niagara Frontier exists and with your help we propose to take prompt action to relieve it.

Robert Moses,
Chairman.

July 25, 1957.

I

THE NIAGARA DEVELOPMENT DOES NOT DEAL WITH A NEW NATURAL RESOURCE, BUT RATHER WITH ONE OWNED AND LONG USED BY NEW YORK STATE.

The 1950 Treaty made more water available, but most of it only part of the time.

While the new project will produce much more power than was formerly produced, the bulk of the completely dependable power will come from water available to and used by New York before 1950 and as a result of greater efficiency of operation.

The new project to produce power at the lowest possible cost requires all the water available in the United States, including that for which the Niagara Mohawk Power Corporation has a license until 1971.

Under this bill Niagara Mohawk will surrender its license and be allowed to purchase the power produced by the water it covers for resale to industry, which desperately needs it.

In determining the amount of power to leave New York, only that produced from additional water made available under the 1950 Treaty should be considered.

The Niagara River has been used for water power since before the Revolution. The first diversionary canal—providing mechanical power—was built in 1806, the first American electric plant in 1881 and the first Canadian electric plant in 1901. New York's Legislature made grants of rights to take water in the 1880s and 1890s.

In the absence of federal legislation or international agreement, New York would have a right to use all the water of the river which it is physically able to take. The first federal legislation limiting Niagara diversions was the Burton Act of 1906. The first international agreement on the subject was the 1909 Treaty with Great Britain. The purpose of the Burton Act and of international agreements limiting the amount of water taken for power was to ensure that enough water was left to go over the Falls to preserve its beauty and its attraction to tourists.

Prior to the Schoellkopf disaster in 1956, 32,500 cubic feet per second of water was being used in the United States for electric power. All of this power was sold and distributed in New York State. Niagara Mohawk has a license which is good at least until 1971 for almost 20,000 cfs and a license terminable at the discretion of the Federal Power Commission for the balance of the 32,500 feet. Niagara Mohawk pays New York State annual fees for the use of the water it takes pursuant to grants from the State.

The stated primary purpose of the Treaty negotiated with Canada in 1950 was to preserve and enhance the scenic beauty of Niagara Falls and its environs. Under the Treaty, additional water may be used in the United States provided the flow of the river is sufficient to allow specified minimum amounts to go over the Falls. Greater amounts are required to go over the Falls in the daytime from April through October than are required at night and during the winter months.

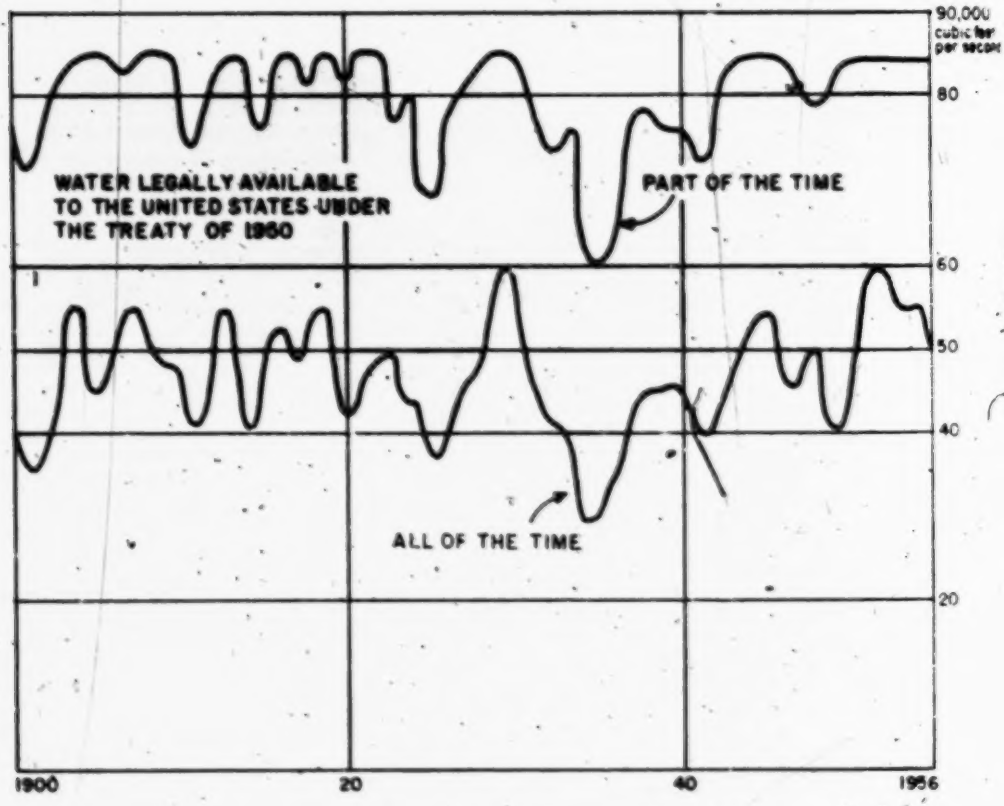
The 32,500 feet of water used in New York under prior international arrangements was available on an around the clock basis 365 days a year. The flow of the river is such that under the 1950 Treaty an average of about 50,000 feet will be available on an around the clock basis during the whole year. However, by normal cycles, the flow is reduced so that only about 35,000 feet is available some of the time and it has been so low at least twice that less than 30,000 cfs would have been available under the 1950 Treaty formula. Thus, the additional

water available under the Treaty to produce absolutely firm power is not large.

When the new project is completed, more dependable power will be developed than heretofore, principally because more efficient use of the water will result from building a plant which takes advantage of the whole drop of the river and from constructing pumping devices and a reservoir to store the extra water available at night for use in the daytime when there is a greater need for power.

Prior to June 7, 1956, Niagara Mohawk at all times produced 465,000 kilowatts (KW) at a 100% load factor. This means that this amount of power was produced 24 hours a day, 365 days a year. By using the full available head, the same amount of water can be made to produce 760,000 KW at 100% load factor. At 70% load factor, which means producing power only 17 hours out of each 24, it can produce 1,100,000 KW. While the water now available to the United States will produce 1,800,000 firm KW, this is at about 70% load factor. It would produce an average of only 1,220,000 KW at 100% load factor, 365 days a year. In a low water year, when the flow is down to 35,000 cubic feet, it would produce only 785,000 KW.

Thus, the bulk of the firm power to be produced from the new development will come from



the first 32,500 feet of water, which is just about the amount of water which is available all the time. The water available only at night will produce less net power per cubic foot because power will be needed to pump it up into the reservoir from which it will later be dropped.

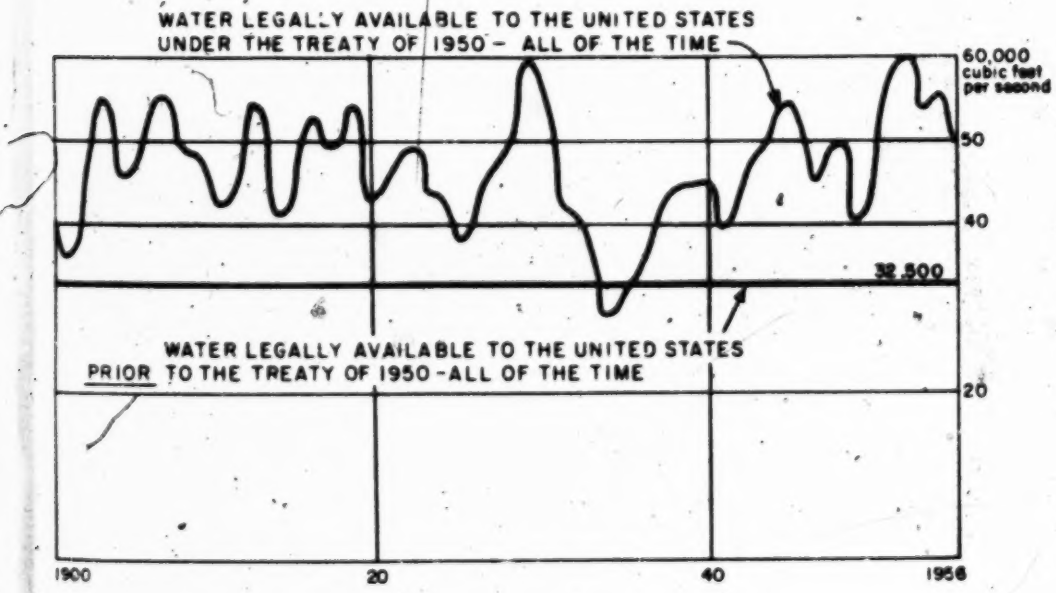
The project which we plan to build will utilize all of the flow of the river available to the United States, including the 19,725 feet for which Niagara Mohawk has a license, good at least until 1971. We propose—and H. R. 8643 specifically authorizes it — to enter into an agreement with Niagara Mohawk by which Niagara Mohawk will surrender its license and we will sell Niagara Mohawk for the benefit of industry in the area 445,000 KW of power on a long term basis at the same price paid by other corporations. Niagara Mohawk will waive all claims for damages based upon grants of water rights by the State and will also waive severance damages. We will, of course, pay it for property actually taken.

445,000 KW is the amount of power which 19,725 feet of water will produce in the Authority's new plant utilizing the full drop of the river and is roughly equivalent to the amount heretofore produced by Niagara Mohawk through the use of 32,500 feet of water at its plants utilizing part of the head.

The Treaty reservation which has held up redevelopment of the Niagara since 1950 reads as follows:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River *made available by the provisions of the Treaty*, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

It is, of course, the Authority's position, as recently held by the United States Court of Appeals for the District of Columbia, that this



reservation is legally ineffective to deprive the Federal Power Commission of authority to grant a license for Niagara redevelopment. In any event, the Commission has always had jurisdiction to license the redevelopment of the 32,500 feet which was available before the 1950 Treaty. However, since 1950 it has not been practical to do so because a sensible redevelopment requires the use of all the water available to the United States.

Congress, of course, has jurisdiction over all of the water regardless of the reservation, but the reservation ought not to be used as an occasion for Congress to take away from New York State the use of water which it has enjoyed for many years.

In determining the amount of power to go outside of the State, only the power produced by water in excess of 32,500 feet should be taken into consideration. Only a relatively small part of this excess is firm power available around the clock, year in and year out, the only type of power which it is practical to send outside the State.

New York recognizes the right of Congress to require part of the power produced from the river to be sold in other states, but claims that it is entitled to paramount consideration because of its property rights and because of the fact that Niagara power has been developed and used in New York for so many years.

New York has taken the responsibility for building the project. It has set up an agency which will be required to borrow $600 million to do the job. It has given this agency the right to use the property of the State of New York needed for the project and has advanced money to the agency in order to get the project going and produce badly needed power.

INDUSTRY IN THE NIAGARA AREA HAS BEEN BUILT UP AS A RESULT OF THE AVAILABILITY OF LOW COST POWER AND THE WHOLE ECONOMY OF THE AREA DEPENDS UPON IT.

As a result of the 1956 destruction of a huge power plant on the Niagara River, the area is faced with an emergency.

Basic industries would already have been forced to move away except for the temporary importation of high cost power from Canada.

The economy of the area and the defense of the United States require use of approximately half the firm power from the new project by industry in the Niagara area.

35,000 of the 37,000 workers in the City of Niagara Falls are employed by the electrochemical and electrometallurgical industries which settled there many years ago because of the availability of low-cost power. These vital defense industries are high load factor industries and utilized practically all of the 465,000 KW produced at Niagara prior to the Schoellkopf disaster and also used more expensive power from other sources. They would already have been forced to close down and move away, or at the very least, drastically curtail their operations except that they have been able to buy power on a temporary basis at high cost from Canada, which is using not only its own share of Niagara water, but a good part of the United States' share also. They cannot continue to stay at Niagara unless newly-developed low-cost power is soon made available. On the other hand, if it is made available, they will expand there.

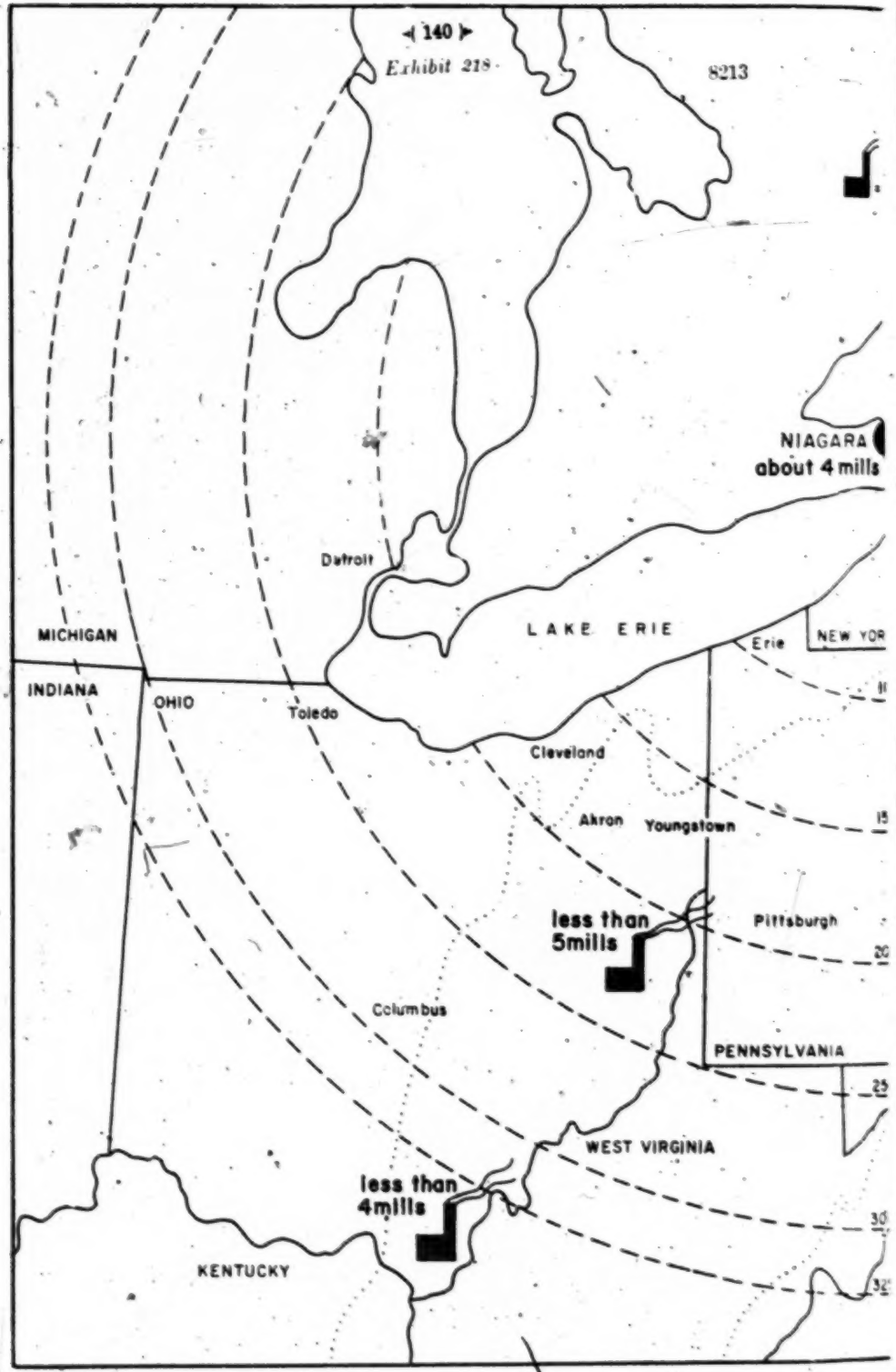
Only 120,000 KW are now being produced at Niagara Falls, although repairs to the Schoellkopf plant to be accomplished soon will produce another 48,000. The total industrial power requirement of the area within 20 miles is now approximately 1,000,000 KW.

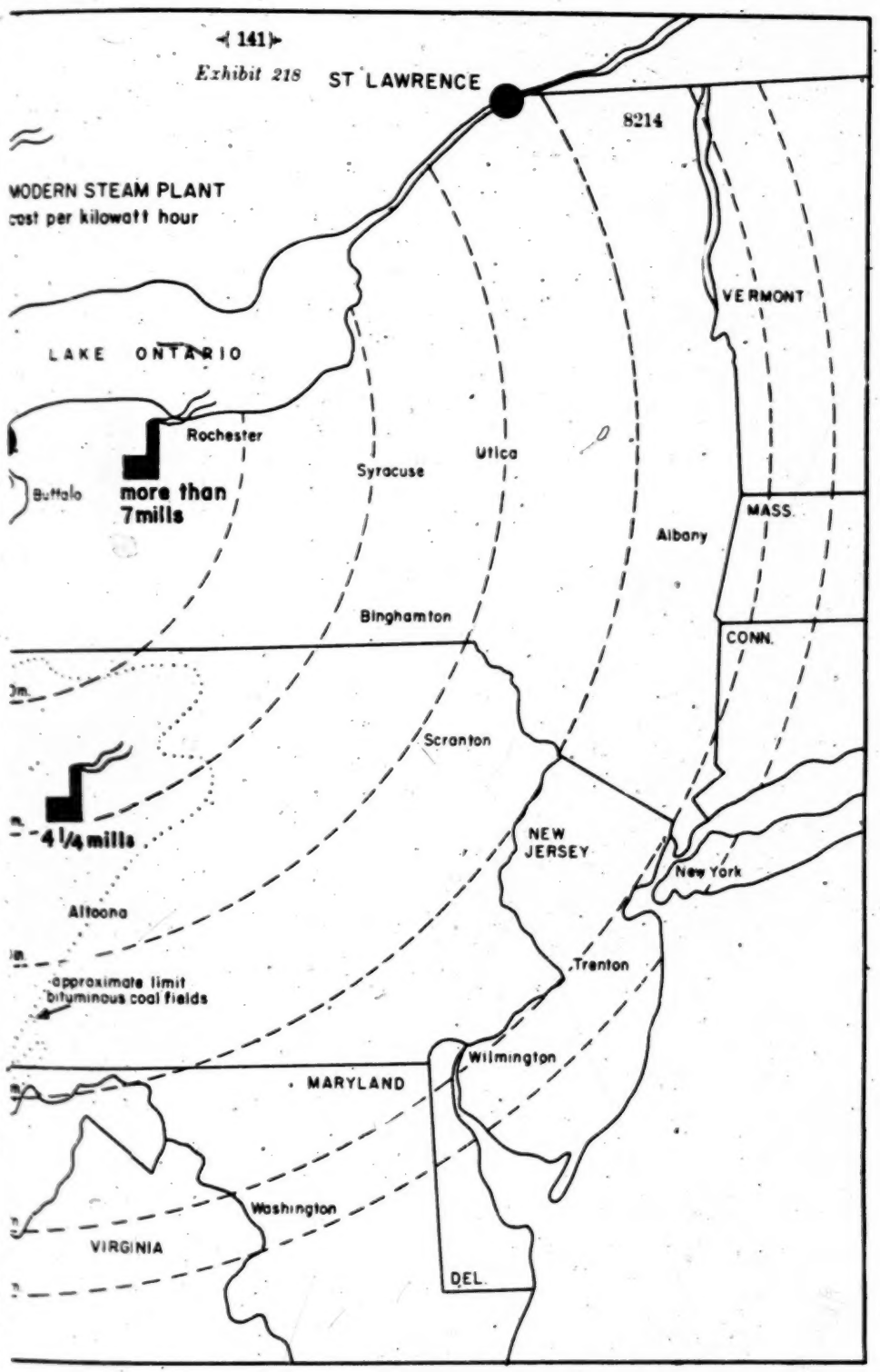
As stated above, the total firm capacity of the new project will be 1,800,000 KW provided we have the use of all the water of the river. If we tie the Niagara and the St. Lawrence together marketwise, there will be an extra 200,000 KW. If we count all this as Niagara power the project will have a firm 17-hour capacity of 2,000,000 KW.

The Niagara Falls industries have told us that in addition to the 445,000 KW which we will provide them through Niagara Mohawk, they will need an additional 255,000 KW for normal expansion within the next 5 years. They will carry out this expansion and stay at Niagara Falls if power is made available to them for 4½ mills per kilowatt hour (KWH) or less.

In addition, it is anticipated that the Federal government will need another 300,000 KW at Niagara strictly for defense purposes.

Hence, we propose to sell approximately 1,000,000 KW right at the site of generation for use in the most efficient manner possible to improve the economy of the area and the defense of the country.


8213
NIAGARA
about 4 mills
Detroit
LAKE ERIE
MICHIGAN
INDIANA
OHIO
Toledo
Erie
NEW YOR
Cleveland
Akron
Youngstown
less than
5mills
Pittsburgh
Columbus
PENNSYLVANIA
WEST VIRGINIA
less than
4mills
KENTUCKY


ST LAWRENCE
8214
MODERN STEAM PLANT
cost per kilowatt hour
VERMONT
LAKE ONTARIO
Rochester
Buffalo
more than
7mills
Syracuse
Utica
Albany
MASS.
Binghamton
CONN.
Scranton
4 1/4 mills
NEW
JERSEY
New York
Altoona
approximate limit
bituminous coal fields
Trenton
Wilmington
MARYLAND
Washington
VIRGINIA
DEL.

SENSIBLE DISTRIBUTION OF NIAGARA POWER REQUIRES ITS USE WITHIN ABOUT 150 MILES OF NIAGARA FALLS.

Nearly three million people live within this area in New York State.

There is already a shortage of power in the area and the increase in demand by the time the project is completed will far exceed what it will produce.

Power produced in the Niagara area from coal which must be imported costs half as much again as steam power in Pennsylvania and Ohio.

Despite the fact that sending Niagara power to those states is like "carrying coals to Newcastle", the bill provides that a generous amount of power be allocated to them.

Under the bill the power available to rural and domestic consumers in New York will be used to meet all the needs of municipalities and cooperatives for at least twenty-five years and will also bring substantial benefits to rural and domestic consumers otherwise served.

Niagara power can be distributed and used within the area where it is most needed in New York much cheaper than it can be distributed and used outside the State. In New York, it can do some real good and result in some real saving. It is absurd at the least to bring coal from Pennsylvania to New York to produce power and take power produced in New York through a natural resource owned by the State back to Pennsylvania.

Power used in the area near Niagara Falls, other than Niagara hydroelectric power, is generated by coal brought from Pennsylvania, Ohio and West Virginia. Niagara Mohawk has huge steam plants right on the Niagara River, a few miles from the Falls and is building more there. The cost of coal used there is $7.90 a ton, of which $3.86 represents transportation. The cost of coal at Rochester, New York, 60 miles east of Niagara Falls, is about $8.85, half of which is transportation.

Firm power produced from our hydro-electric project will cost about 4 mills per KWH. The cheapest steam power in the area costs about 6 mills. Power from the new steam plants now under construction on the Niagara River and on Lake Ontario near Rochester will cost more than 7 mills. Thus project power can result in much greater savings if used near its source than if transported at high cost to distant areas. This is especially true since the cost of transmission lines in heavily industrialized, built-up western New York is extremely high.

We have just completed marketing St. Lawrence power. In doing so we learned that by the time we carry that power 150 miles, its cost to the purchaser, taking into consideration line losses and transmission charges, will just about equal the cost of power from other sources. While Niagara power will be slightly cheaper than St. Lawrence power, the cost of transmission will be somewhat higher. Therefore the economic market areas of the two projects will be about the same size.

2,140,000 people live within 100 miles of Niagara Falls in New York State. They now require 3,400,000 KW of power, including that being supplied on a temporary basis from Canada. By 1965 they will require 5,000,000 KW.

Within 150 miles, 2,843,000 people live in New York State. They now require about 4,000,000 KW and will need 6,000,000 KW by 1965.

Thus, the entire output of the project could easily be absorbed in the area of New York State within 150 miles of Niagara Falls.

However, under the compromise provision contained in H. R. 8643, as much as 180,000 firm KW could be required to be exported from the State. This compares with 150,000 KW which we tentatively allocated to Pennsylvania and Ohio before the bill was drafted by the Senate Public Works Committee.

645,000 people live within 150 miles of the project in Pennsylvania, most of them in the heart of the coal fields. 113,000 people live within that radius in the northeast corner of Ohio. Under the formula provided in the bill, of the approximately 800,000 firm KW available to rural and domestic consumers strictly from the Niagara project, 22½% could go out of the State.

This would leave 620,000 KW derived solely from the Niagara, plus 200,000 KW derived from the tie-in of the Niagara and the St. Lawrence, or a total of 820,000 KW for rural and domestic consumers to whom the power can economically be made available in New York.

Of the 46 municipal systems in New York State, 43 are within the combined economic market area of the Niagara and St. Lawrence projects. Of these, 17 are much closer to the St. Lawrence and will be served by that project beginning next year. There are 5 rural electric cooperatives in New York State. Three of them are in the St. Lawrence area and 2 of them in the Niagara. The present total needs of the 17 municipals and 3 cooperatives which are close enough to the St. Lawrence to be served by it are now 43,000 KW. 100,000 KW of St. Lawrence power has been allocated to them, the part they cannot use at first having been sold to a private utility subject to being withdrawn when they need it.

The total present demand of all 43 municipalities and all 5 cooperatives is now 127,000 KW. It is estimated that even if the present rapid increase in power use continues for the next 25 years, their needs will not exceed 425,000 KW by that time. To meet all the prospective needs of these municipalities and cooperatives, we have allocated 325,000 KW of Niagara power in addition to the 100,000 KW of St. Lawrence power. As in the case of the St. Lawrence, the Niagara power which the municipalities and cooperatives are not ready to use will be sold to utility companies on a withdrawable basis.

The balance of the firm power available to rural and domestic consumers in New York and all of the non-firm power from the project will be distributed by these companies for the benefit of their rural and domestic customers. Three private utility companies serve 94% of the rural and domestic consumers in the Niagara economic market area. These customers total 771,000 and now use 700,000 KW annually. By 1960 they will need 900,000 KW and by 1985 4,000,000 KW.

New York law requires that power sold to utility companies be resold to their customers without profit and the contracts we have made for the sale of St. Lawrence power contain provisions putting this requirement into effect. The contracts allow the companies to charge their customers only what they pay for the power, plus the cost of distribution. Similar contracts will be made for Niagara power, the companies passing on to their rural and domestic customers the savings realized as a result of the difference between the cost of power purchased from the Authority and power from other sources.

Since Authority power will cost only about 4 mills and the cheapest power which the companies get from other sources runs from 6 to 8 mills, the benefit to the rural and domestic consumers in the area will be substantial.

In addition, the contracts with the companies will provide as they did on the St. Lawrence for wheeling power to municipalities and cooperatives at reasonable rates, so that these entities, most of which have no generation facilities of their own, will benefit materially from Niagara power.

IV

NIAGARA POWER DELIVERED TO PENNSYLVANIA AND OHIO WILL BE AS EXPENSIVE AS POWER PRODUCED THERE BY MODERN METHODS FROM COAL.

Niagara power brought to Pennsylvania and Ohio solely for the use of cooperatives and municipals would at their load factors cost more than they are now paying for power from other sources.

To all but a few of the closest of them the cost would be prohibitive.

While Niagara power could be transmitted in large blocks at high voltage and high load factor to some points in Pennsylvania and Ohio at a relatively cheap overall cost, it would nevertheless be more expensive than power produced there by other means.

Any savings resulting from the use of Niagara power in those states to replace power developed by antiquated methods would be much less than savings which would accrue if the power were used in New York closer to the point of generation.

There is serious doubt whether Pennsylvania and Ohio actually want Niagara power in view of the fact that the legislatures of both states this year killed bills which would have established agencies to purchase it.

However, these and other states may yet establish such agencies, and if they do, full federal preference coupled with a requirement for sale "within economic transmission distance" of the project could have the absurd result of taking nine-tenths of Niagara power out of New York.

Such agencies would be preference customers and could act as brokers to sell Niagara power for whatever purposes the laws of the states creating them prescribed.

Actually H. R. 8643 if enacted, will be the first federal legislation relating to non-federal power development requiring any type of preference.

Pennsylvania and Ohio have abundant coal, while New York has none. Power is actually being produced by a modern steam plant near coal mines at Shawville in west central Pennsylvania for about 4 mills per KWH. Other modern steam plants in Pennsylvania have comparable costs. On the Ohio River in Ohio, where cheap coal is available, the Ohio Valley Electric Company is producing power for less than 4 mills. These prices include tax payments. If a public body were to produce power at the same locations by the same methods without paying taxes, it could produce power much more cheaply.

To take Niagara power to the Pennsylvania line would require the building of transmission lines close to 100 miles at tremendously high cost. Little or no benefit to Pennsylvania or to its municipalities and cooperatives would result.

If the Authority were to build lines and transmit power to the Pennsylvania line in very large blocks at a load factor of about 75%, it could probably do so for something in the neighborhood of 2 mills per KWH. However, the cooperatives and municipalities could not take power in large blocks because their individual and collective loads are very small. There are 13 cooperatives in Pennsylvania. Ten of them are in the western part of the State and have a total load of only 52,000 KW. Three of them are in the northeastern part of the State and have a total load of only 13,000 KW. There are 38 municipal systems scattered throughout the whole State which last year purchased only 26,000 KW. The cooperatives and municipali-

ties could not use power at 75% load factor because the load factors of the cooperatives average only 45% and of the municipals only 50%. If they contracted to purchase power at 75% load factor, part of it would have to go to waste or be resold to others at dump prices because it would be available only at hours when least needed.

The nearest of the cooperatives and muncipals outside New York State is the Warren cooperative located in Youngsville, Warren County, Pennsylvania, approximately 95 miles from Niagara. It has 2,900 customers with a demand of 3,000 KW. It purchases power from a private utility for 8.8 mills. The utility delivers it at several points in the cooperative's territory. The cooperative retails it for 34 mills. Its load factor is only 32%.

If the Authority were to build lines solely to transmit power to this and neighboring cooperatives and municipalities the lowest conceivable cost of transmission at their low load factors would be 8 mills. At 32% load factor Niagara power would cost at least 6.5 mills at Niagara. Hence, the cost to the Warren cooperative would be at least 14.5 mills at one point of delivery and further expense would be involved because it would have to build lines to transmit the power around its territory.

The cheapest way by which Niagara power could be delivered to Pennsylvania cooperatives would involve a wheeling arrangement with New York and Pennsylvania utilities. Assuming that this could be obtained, the cost of wheeling, including losses, step down and delivery to many points in each cooperative's territory would be at least 4 mills in western Pennsylvania. Since power at their average load factors would cost about 5.3 mills at Niagara the total cost would be about 9.3 mills. This would result in no savings, since power is now purchased by the ten cooperatives in western Pennsylvania for an average of 8.5 mills.

The group of three cooperatives in North Eastern Pennsylvania averaging 160 miles from Niagara with load factors of about 45% pay 10.4 mills for power from utility companies, but the lowest cost at which the Authority could build lines to transmit power to them would be 15 mills. Again assuming complete cooperation by private companies in both states, power could be wheeled to them for about 6.3 mills, including losses and step down. Since the cost at Niagara would be 5.3 mills their tota cost would be at least 11.6 mills and result in no saving.

The cost of carrying Niagara power to cooperatives and small municipalities in the interior of Pennsylvania and Ohio would be prohibitive. This is particularly true in the case of cooperatives, which depend upon utility companies to supply the backbone of their distribution systems by making delivery at many points.

If Pennsylvania or Ohio enacted legislation establishing a public agency to purchase Niagara power, and took a substantial block of power such as 100,000 KW or more, at 70% or 75% load factor at one point of delivery, delivery could be made at a total cost in the neighborhood of 6 or 7 mills depending upon the distance from the New York border. The public agency would be a preference customer under the fraditional federal preference language and under the provisions of H. R. 8643. It could act as broker for the power and because the load factors of cooperatives and municipalities are so low it would of necessity have to sell a substantial part of it to other customers. It would undoubtedly sell the power according to the directions contained in its enabling legislation.

Such a purchase of power might be attractive in Pennsylvania or Ohio despite the fact that power could be produced from modern steam plants cheaper. This is because the necessity of building new plants would be postponed and because power is now being produced in some antiquated plants in both states at higher costs.

In any case, the amount of savings from Niagara power in Pennsylvania or Ohio would be much less than the savings experienced from the use of the same power in New York State closer to the point of generation, and much less than the savings which could be experienced in Pennsylvania or Ohio by the building of modern steam plants.

Nevertheless, legislation which would authorize the exportation of more power from New York than that provided in H. R. 8643 would put New York in danger of losing part of its just share of power which it badly needs to states whose needs are much less acute.

On the St. Lawrence we have demonstrated that we can be fair and sensible in distributing power outside the State. Our St. Lawrence license was issued under the Federal Power Act without specific Federal legislation. The license provides that a reasonable amount of power be made available within the "economic market area" in neighboring states. Vermont, Massachusetts and New Hampshire each enacted legislation setting up agencies to purchase power. We sold 100,000 KW to Vermont and refused to sell any to the other states. Almost all of Vermont is within 150 miles from the St. Lawrence power plant, whereas only corners of New Hampshire and Massachusetts are within 200 miles. Power costs in Vermont are very high because it is so far from coal fields. We found that we could build a transmission line to the Vermont border and in cooperation with the private utilities in northern New York transmit power to Vermont—which it is able to take at a very high load factor—at a total cost substantially less than power from other sources. Vermont was, therefore, within the "economic market area".

Massachusetts and New Hampshire appealed to the Federal Power Commission, but withdrew their appeals after Massachusetts hired the Stone and Webster Engineering Corporation to furnish a report which stated, as we had said already, that the cost of transmitting even a block of 250,000 KW approximately 200 miles, coupled with the losses involved, would make the total cost of delivered power just about equal to the price at which power could be produced by modern steam plants in Massachusetts. These states, while within "economic transmission distance" as that phrase is often interpreted were not within the "economic market area." It would make no sense and therefore would not be economic to take St. Lawrence power, which can produce an average saving of 2 or 3 mills if used within 150 miles of the point of generation, and send it to Massachusetts and New Hampshire where it would result in little or no savings.

Legislation providing full federal preference would of course lead to completely absurd results, chiefly because of the small number of preference customers in New York compared to neighboring states.

Full federal preference coupled with a requirement that power be distributed outside the state to areas "within economic transmission distance" as distinguished from the "economic market area" would result in 162,000 KW or 9% of the total remaining in New York, and 1,638,000 KW or 91% leaving the state. Even if New York were not entitled to consideration because of its property rights and because of its developing the project, this would be unconscionable. However, this has been continuously, consistently and vociferously advocated.

Despite the efforts of groups and individuals from outside the State of New York to have full federal preference incorporated in federal Niagara legislation, both the Pennsylvania and Ohio legislatures at their most recent sessions turned down bills which were introduced for the purpose of establishing state agencies to purchase Niagara power.

The Pennsylvania bill (Senate No. 548) provided for creation of a Pennsylvania Power Authority, which would have been an agency of the state authorized to buy and sell power and to build transmission lines to distribute it. It could have sold power to public or private electric systems "to best serve the needs of the people and industry of the State". The bill was referred to the Committee on appropriations where it died.

The Ohio measure (House Bill No. 894) would have designated the Public Utilities Commission of Ohio as the agency of the State to buy and sell electricity from any source outside the State. The bill provided that preference for the purchase of such electricity be given "on the basis of need". At hearings held on the bill by the Committee on Commerce and Transportation, supporters of the bill told the

Committee that if it were not passed, Ohio would lose its opportunity to obtain Niagara power. Nevertheless, the Committee killed the bill.

These actions indicate that legislators of both states have considerable doubt of the wisdom of purchasing power from the Niagara. In Pennsylvania, the desire to promote the use of coal and to relieve unemployment in the coal fields undoubtedly was important. However, there is no assurance that at coming sessions such bills will not be passed setting up agencies which would of course be preference customers.

Actually, if H. R. 8643 is passed it will be the first time that federal preference in any degree has been included in legislation authorizing a power development by an agency other than the Federal government.

Bills passed by Congress allowing state agencies to harness rivers and develop power have uniformly been passed without any preference provisions. Examples of these are: The Alabama-Coosa River Project (Act of June 28, 1954, Public Law 436, 83rd Congress, 2d Session); Markham Ferry Project (Act of July 6, 1954, Public Law 476, 83rd Congress, 2d Session); Priest Rapids Project (Act of July 27, 1954, Public Law 544, 83rd Congress, 2d Session).

In addition many projects have been built under the Federal Power Act without a preference requirement as this one would have been except for the reservation to the 1950 Treaty.

V

THE POWER AUTHORITY, A CREATURE OF STATE LAW, COULD NOT ACCEPT A LICENSE CONTAINING PROVISIONS DIRECTLY VIOLATIVE OF STATE LAW OR DESTROYING RIGHTS BELONGING TO THE STATE.

New York State does not presume to prescribe the terms of Federal legislation. Nevertheless, the New York Power Authority has only such powers as the State law gives it, and cannot accept a Federal license if the licensing provisions are directly opposed to the State statute which created it.

State law declares the Niagara River to be the inalienable property of the people of the State. It directs that power be developed and sold for the benefit of the people as a whole, particularly rural and domestic consumers to whom it can economically be made available. It authorizes sales to high load factor industry because this is for the benefit of the people as a whole and brings sufficient revenue returns to make the price of power low for rural and domestic consumers. It directs that a reasonable amount of power be made available to municipalities. The Power Authority has construed the statute to mean that municipalities and cooperatives can have all the power they can use and pay for, even though this gives them a greater proportion of the total power in relation to numbers of customers than goes to private companies serving rural and domestic consumers in the area. Part of the reason for this is that most of the municipalities and cooperatives do not have generating facilities of their own and have higher power costs than private companies.

State law requires that all domestic and rural consumers within the economic market area shall get the benefit of the power. Any license requiring all the power to go to customers of municipalities and cooperatives would be directly opposed to New York law and the Authority could not accept it.

State law says that a reasonable amount of power may go outside the State. A license with full preference provisions and a requirement that power be sold in all areas outside the State within "economic transmission distance", as opposed to "economic market area", would result in the bulk of the power going outside the State and would be in direct conflict with State law. *The Authority could not accept such a license and if it did could not finance the project.* It can not finance the project unless its bond attorneys can honestly say that it has a right under New York law to accept the license. It can not in any event sell bonds to prudent investors without state credit backing on uneconomical and unreliable terms and in the face of conflict with state law and inevitable prolonged litigation.

New York is willing to make a fair share of Niagara power available to neighboring states which can make good use of it, just as it was willing to share St. Lawrence power fairly.

VI

H. R. 8643 REPRESENTS A COMPROMISE OF CONFLICTING VIEWS BUT WILL RESULT IN A FAIR AND EQUITABLE DISTRIBUTION OF NIAGARA POWER, AND THE POWER AUTHORITY CAN ACCEPT A LICENSE, AND WE BELIEVE, FINANCE DEVELOPMENT UNDER IT.

In resolving conflicting views, the proponents of H. R. 8643 have most commendably taken action to prevent further delay in the construction of this extremely important project and further waste of this great power potential. There is already a critical shortage of power in the Niagara area, and delay has already increased the cost of the project from $385,000,000.00 in 1950 when the Treaty was signed to approximately $600,000,000.00. Further delay would be bound to increase even more the cost, and therefore the price at which power can be sold.

New York can accept a license under H. R. 8643 because, as the Attorney General, Louis J. Lefkowitz, has stated; the bill will allow the Authority to take care of all the needs of New York's municipalities and cooperatives, and at the same time provide power for other rural and domestic consumers to whom it can economically be made available.

As the Attorney General has further advised, provisions of the bill dealing with the sale of power outside the state also conform to New York law.

Discussions with financial groups interested in the bond sale indicate that they have confidence in the terms and conditions of H. R. 8643.

The bill will permit Niagara power to be distributed fairly in New York and neighboring states. By providing that the United States be reimbursed for the cost of the remedial works which it built in cooperation with Canada and by authorizing the Power Authority to build a a scenic park and parkway as part of the cost of the project, the bill will carry out the prime purpose of the 1950 Treaty which was to preserve and enhance the beauty of Niagara Falls and its environs.

Exhibit 219 8223

July 25, 1957

RELEASE - NIAGARA BROCHURE (Showing Schoellkopf)

Distribution

A1a - Power Authority - Personnel

A1b - Power Authority Consultants, etc.
(John Davison received 15 copies
Atty. Gen. Lefkowitz received 1 copy)

P1a - Newspapers - Main City - City of Editors

P1b - Financial Newspapers

P1g - Upstate Newspapers (All of Group A and B plus following)
1) The Evening News - N. Tonawanda
2) The Union Star - Schenectady
3) The Gazette - Schenectady
4) The Observer Dispatch - Utica
5) The Daily Press - Utica

P1i - Newspapers - Main City - Editorial Writers

P1w - Washington Correspondents

S1a - Governor's Office etc.

U1i - Federal Power Commission

U3b - Directors of Niagara Mohawk

U3c - Directors of N.Y.S. Elec. & Gas

U3d - Directors of Rochester Gas & Elec.

U1b - U.S. Representatives
Staff

Mr. Latham - Niagara Falls - 3 Copies

HAND DELIVERED - Categories P1a and P1i - Also Wall St. Journal and Journal o
Commerce

FIRST CLASS-SPECIAL DELIVERY - (5 each) Sen. Ives and Javits
(At Penn Station P.O.) Congressmen Buckley and Miller

ALL OTHER MAIL - FIRST CLASS

Exhibit 220 8224

POWER AUTHORITY OF THE STATE OF NEW YORK

10 COLUMBUS CIRCLE
NEW YORK 19, N. Y.
TELEPHONE COLUMBUS 5-6510

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J. BURCH McMORRAN
CHIEF ENGINEER
THOMAS F. MOORE, JR.
GENERAL COUNSEL
HENRY S. TALIAFERRO
DIRECTOR OF
POWER UTILIZATION

To: The Members of the Senate of the United States

Re:

A BILL

To authorize the construction of certain works of improvement in the Niagara River for power and for other purposes.

(S. 2406, 85th Congress, 1st Session)

This is a reasonably satisfactory compromise bill unselfishly worked out by senators who are advocates of public power; senators who believe absolutely in private power and senators who recognize states' rights including the proprietary rights of the State of New York in the Niagara River. These diverse points of view are reconciled in this act because its authors have recognized the peculiar conditions at Niagara and the urgent need of prompt action there. Senator Kerr and his associates on the Public Works Committee and both Senators from New York in a notable exhibition of good will have spent much time and thought in fashioning a measure to bring an end to the seven-year waste of a great natural resource and to relieve the power shortage and emergency which threaten the entire economy of our Niagara Frontier.

This bill was introduced and passed in the House after it was reported out by the Senate Public Works Committee. It was passed in the identical form in which it was drafted by Senator Kerr and his colleagues. The only amendments to the bill which have been offered in the Senate deal with the amount of power to be exported from New York. Two of these amendments are designed to increase this amount and one of them to limit it.

No amendment was introduced in the House to increase the amount of power required to be sold outside New York, but a member from Pennsylvania with the support of some other members from Pennsylvania and Ohio and West Virginia introduced an amendment designed to insure that no power would be sold in New York's neighboring states unless the power was needed there and could be sold cheaper than power from other sources. The House wisely rejected this amendment on the ground that it was entirely unnecessary. The House therefore sent to the Senate the identical bill which was pending before it thus reducing the danger that adjournment would come without the final passage of this vitally needed legislation.

We respectfully and urgently request the Senate to take similar action and allow us to proceed with the important job of harnessing the energy of the Niagara for the good of the people within the economic market area and for the defense of our country.

Enclosed is a brochure which we prepared for the members of the House prior to its action on the bill and which answers the objections made to the bill in the Senate.

As the brochure shows, this compromise bill is fair to all divergent interests.

1. It allows New York, whose ownership of the bed of the Niagara River and of the right to use its waters subject to the paramount regulatory rights which Congress has because it is a navigable and boundary stream, has been repeatedly sustained by the Supreme Court, to carry out a comprehensive power development. This is not a new resource. In fact the bulk of the water available to the United States on a completely dependable basis was used for power purposes for a great many years.

2. Recognizing that the primary purpose of the 1950 Treaty and prior international agreements limiting the amounts of Niagara water which can be used for power was the preservation and enhancement of the natural beauty of the Niagara Falls and environs, the bill provides that the power licensee shall reimburse the Federal government for the United States' share of the remedial works which the United States and Canada constructed in the River pursuant to the 1950 Treaty, and provides that the licensee shall construct a scenic drive and park which will go far to make up for years of neglect, depredation and spoliation on the American side.

3. It provides for the use of all the water of the Niagara to which the United States is entitled including that for which the Niagara Mohawk Power Corporation has a Federal Power Commission license good at least until 1971. It authorizes sale to Niagara Mohawk for the benefit of existing industry of an amount of power roughly equivalent to what Niagara Mohawk produced prior to the rockslide which destroyed a large part of the giant Schoellkopf power plant on June 7, 1956. Niagara industry is dependent on power and is vital to the defense of the country. Moreover it employs practically all of the workers in this area. The bill allows a reasonable amount of additional power to be sold to the area's manufacturers so that these industries can remain in Niagara Falls and expand there to a limited degree. It also makes provision for use by the Federal government of a substantial block of power for strictly defense purposes.

4. The bill assures all the rural electric cooperatives and all but three or four of the municipal power systems—which are too remote—in New York State of all the power they can forseeably use for at least 25 years.

5. The bill assures the availability of a substantial amount of power to the farmers and domestic consumers served by private utility companies in Western and Central New York, and thus complies with the New York law which established the Power Authority and enables the Authority to accept a license and finance the project.

6. The bill assures neighboring states of a reasonable amount of power. The amount provided is eminently fair, particularly in view of the fact that New York's Power Authority must take the responsibility for borrowing from prudent investors the huge sum of $600,000,000 and for building the project, and the fact that each of the neighboring states to which Niagara power could be of any conceivable benefit is fortunate in having natural resources in the form of coal and can produce power from this source as cheap as or cheaper than hydroelectric power can be produced on the Niagara.

Had the Niagara Project been built when the last Treaty was signed in 1950, it would have cost $385,000,000 rather than $600,000,000. We exhort the Senate, in line with the magnanimous action taken by its Public Works Committee, quickly to pass this bill, to avoid not only further waste of this great natural resource but to prevent further increases in the cost of the job.

ROBERT MOSES
Chairman

August 8, 1957.

Exhibit 221

Distribution:

Members of Senate - hand delivered
Trustees
Staff
F.S. Wood, Esq.
Uhl, Hall & Rich - Boston
Uhl, Hall & Rich - Massena
L. E. Cliffe
W. H. Latham - Massena, N. Y.
L. N. McClellan
Rosenman
Spargo
F. Dougherty

Exhibit 229

552 Third Street
Niagara Falls, New York
Feb. 11, 1939

Mr. W. K. Harrison
U.S.Government Agent for Indian Affairs
Salamanca, New York

Dear Sir:

I am interested in leasing a plot of ground on the Tuscarora Reservation near Niagara Falls. I have heard from several sources that it is possible for an American citizen to do this, and would appreciate your telling me where I can obtain further information.

The amount of land that I want to lease would depend upon the yearly rental figure, and a long-term lease is desirable. I would appreciate your advising me the name of the local Agent for Indian Affairs, and/or the necessary steps to start negotiations.

Yours very truly,

J. E. Donald Hastie

New York Agency
Salamanca, New York
February 21, 1939

Mr. J. E. Donald Hastie
552 Third Street
Niagara Falls, New York

Dear Mr. Hastie:

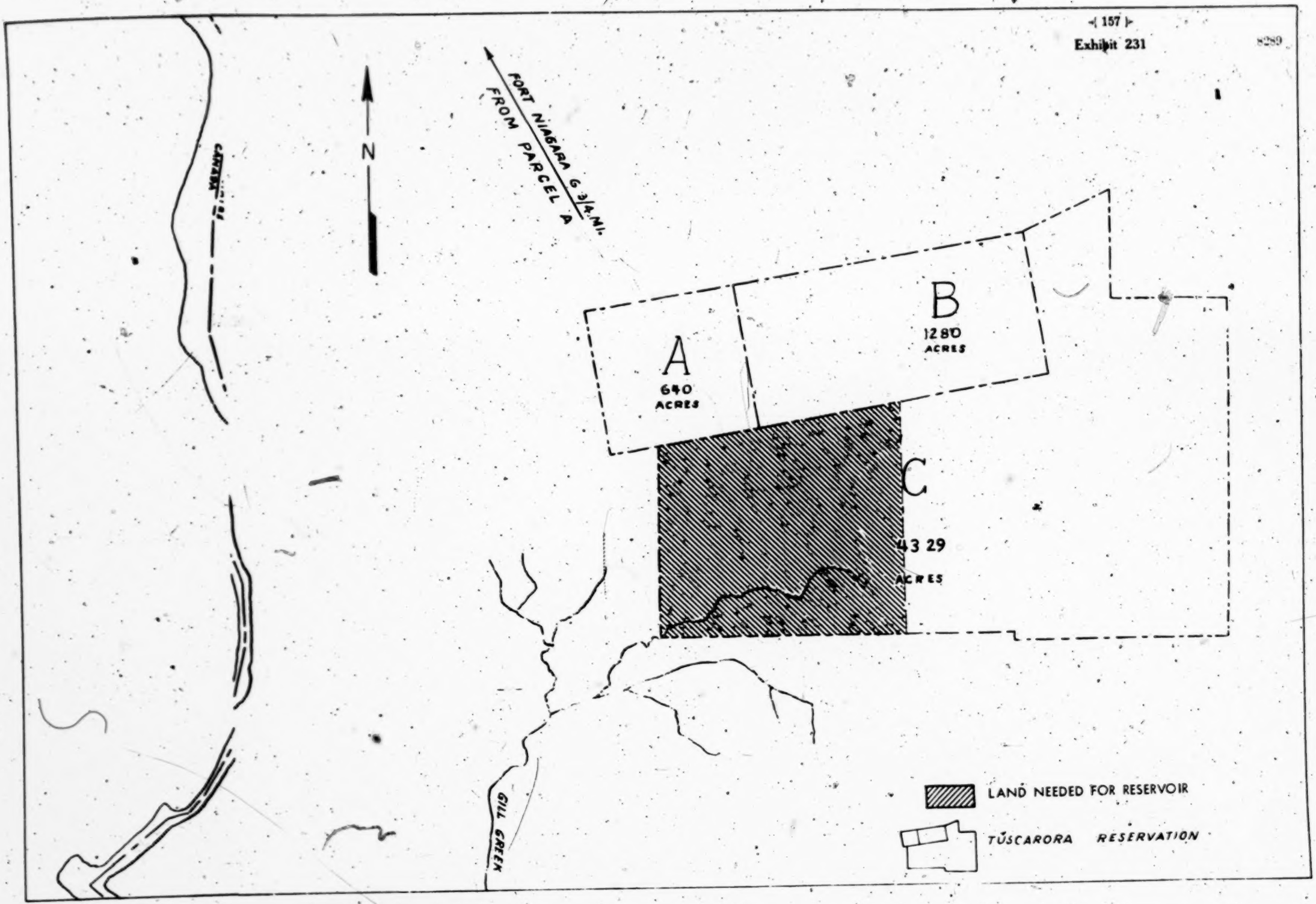
Your letter of February 11 addressed to Mr. W. K. Harrison relative to the leasing of a plot of ground on the Tuscarora Reservation has been referred to me for reply.

We have no jurisdiction in the matter of approving leases of lands on the Tuscarora Reservation. Therefore, it is suggested that you contact any of the Chiefs of the Tuscarora Reservation and they may be able to advise you of any one who would be willing to lease some land to you. In as much as I have no jurisdiction in these matter, the lease and the terms of the lease will be between yourself and the lessor.

Very truly yours,

Chas. H. Berry
Superintendent

CHB:ij


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GILL CREEK
LAND NEEDED FOR RESERVOIR
TUSCARORA RESERVATION

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

IN THE MATTER OF

POWER AUTHORITY OF THE STATE OF NEW YORK

PROJECT No. 2216

EXHIBITS LETTERED A TO X

SUBMITTED BY

LICENSEE, POWER AUTHORITY OF THE STATE OF NEW YORK

November 24, 1958

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It appears that the Tuscaroras Indians have been forgotten at the last Treaty; their number is small and they have claimed the reservation of the tract which they are now settled upon. Their claim does not excede one mile Square Mr. Thomas Morris has thought their claim so just and the grant thereof so good a policy that by a writing of his own hand signed on behalf of Rt. Morris on the 23d. Sepf. [*] he has granted to those Tuscaroras the use and occupation of that one Square Mile. The Holland land company wishes to confirm the grant of those 640 acres; but upon condition to keep the preemption right for the company. The Secretary of war will give you a letter or document adressed to the Indians by which it will appear the President of the United States does consider you as a fit and trusty agent to ascertain and to fix the boundary lines of their reservations.

[*] The Treaty of Big Tree was concluded September 15, 1797, and by it the Seneca Indians granted to Robert Morris their rights to western New York, excepting certain reservations for themselves.

Exhibit 232 8296–8297

3

EXCERPT FROM REPORT FOR THE YEAR 1798 OF JOSEPH ELLICOTT TO THEOP. CAZENOVE AND PAUL BUSTI (32 PUB. BFLO. HIST. SOC. AT 54-55).

RESERVATION AT TUSCARORA.

Statu quo.

At the treaty or convention entered into at the Genessee, there being no provision made for a reservation at that place, the Tuscarora Indians petitionned Mr. Morris for a tract of land sufficient to include their village and farming or planting ground laying contiguous thereto and by your instructions I am authorised and empowered to lay the same off for the said Indians, and by a grant made by the Indians at Buffaloe Creek at their general meeting in the month of June last, they directed that one Square mile in addition to the Square mile given by Mr. Morris, should be laid off at that place. In conformity with the above grants a Surveyor was sent for the purpose of laying off said lands at the Village afore said instructed for that object; but on his arrival and making the purport of his mission known, the Tuscaroras refused to allow the said reservation laid out for the present alledging the lands given them were too small to include their village, Planting ground, timber fire wood &c. &c. consequently that business was for the present suspended. However as the treaty or convention made no provision for a reservation at this place, no evil consequences can possibly result from it on that account.

EXCERPT FROM REPORT FOR THE YEAR 1799 OF JOSEPH ELLICOTT TO PAUL BUSTI (32 PUB. BFLO. HIST. SOC. AT 86-87).

TUSCARORA RESERVATION

The other remaining object to be accomplished respecting the Indian lands was that of the Tuscarora Reservation. In conformity to your letter of Instructions dated the 7th day of September 1799, which came to hand on the 25th day of September following, I attended to the Tuscarora Village for the purpose of agreeing with the Nation upon the principles and terms they should hold the lands granted to them by the Holland Land Company, and to survey & lay off said Tract, which was carried into effect upon the following terms of agreement Vizt. That the Holland Land Company to whom the Land in question belonged had authorised and directed me to lay off two square miles of land to include the Tuscarora Village, which land should be granted to the Indians for their sole use & benefit as long as they should think proper to reside thereon, and during the whole time of such residence, the Holland Company would relinquish the right of disposing of or occupying any part of the two square miles: but that the Tuscarora Indians should be precluded from the right of making a lease or sale, or any conveyance of the whole or any part thereof, and in case they should think proper to remove from said reservation the same should immediately revert back to the Holland Company. Reference to the General Map will show its local and relative situation.

LETTER FROM CAPT. ISRAEL CHAPIN TO THEOP. CAZENOVE, DATED JANUARY 27, 1799, CONCERNING THE TUSCARORA RESERVATION (22 PUB. BFLO. HIST. SOC. 421-422).

Dear Sir:—A few days before I left home the principal chiefs of the Tuscarora nation came to me with an earnest request that I would petition the Holland company that their reservation might be enlarged and at the same time presented a large belt of wampum as a token of their earnest desire.

The Tuscaroras state that Mr. Ellicot sent a party of surveyors to run off their reservation (*viz.*) one mile square presented to them by the Holland company and also one mile square granted by the Seneca nation. The surveyors began at the westermost part of their town and run a course east, and the two miles aforesaid did not include the whole of their houses and farms. (The number left out are the red marks on the small piece of paper inclosed which they gave to me.) The Tuscaroras made a very sensible speech on this subject—That they found the tract allotted to them was not sufficient to afford them a living, that they had many children among them which they were teaching to work in the manner that white people do, as they found they could not have recourse to any other method & without a larger quantity of land they must soon leave their poor children in a miserable condition. They say they have always been a peaceable people, that when other nations were at war with the United States, they were peaceable, that if they had been of a bad disposition they might have joined the hostile Indians, as they had no land then that they could call their own and could have quitted their country; but they say thay have chosen the place where they now live, having been driven quite from North Carolina and they beg their seats may be made so long as to yield them a living and their children after them. The principal chiefs of the Seneca nation were present at this talk and were much interested in the same, and told me that

the Holland Land company might rest assured that if she would grant one more square mile to the Tuscaroras they would grant another on their part, making two square miles to be added to the two they had before.

I can add for my own opinion that I think the Tuscaroras as much deserving as any Indians, from their peaceable dispositions and their habit of industry which they appear desirous to promote; I believe Sir would you have seen them in their concern, the anxious feeling for their children and their own accommodation, would led you at once to have granted their request. I have thought it would not be improper to give you this statement in writing that you might be enabled better to understand the business.

Dear Sir, I have the honor to be with perfect esteem

Your obedient Servant,

Israel Chapin.

LETTER FROM THEOP. CAZENOVE TO CAPT. ISRAEL CHAPIN DATED JANUARY 31, 1799 CONCERNING THE TUSCARORA RESERVATION (25 PUB. BFLO. HIST. SOC. 211).

PHILADELPHIA, 31 Jany. 1799.

Capt. ISRAEL CHAPIN,

Agent of the U. S. for Indian Affairs:

SIR—I have received your letter of the 27th inst, and also the belt of wampom [*sic*] presented by the chiefs of the Tuscaroras nation to the Holland land Company as a token of their earnest desire to have their reservation of land extended so as to comprehend one mile square of land [more] than the one mile square already granted to them, stating for reason of their request that a quantity of their wigwams have not been included in the land lately laid out for their use and that the tract allotted to them is not sufficient to afford them a living, the cultivation of the land being the only ressource they can recurr to.

Being only the Agent of the Holland Land company I can act only according to my instructions, and as those instructions contain no power to make a donation of land, I must request you to state to the chiefs of the Tuscarroras nation that their representation shall immediately be forwarded to Holland; but that from the knowledge I have of the Holl'd L. comp's generosity and good wishes towards the Indian tribes I have every reason to expect a favorable answer, and that Mr. Paul Busti who will succeed me in the comp'y.'s Agency will receive the proper instructions to grant to the Tuscaroras nation one mile square of land annexed to the one mile square already granted, and upon the same clauses & conditions. In the meantime Mr. J. Ellicot shall be directed to lay out that new mile square of land in a manner convenient for both parties, in order that everything may be settled and ready when the expected authorization shall arrive.

I am with great regard,

Your most obedient humble Servant,

THEOP. CAZENOVE.

SPEECH BY SACCOREESA, A CHIEF OF THE TUSCAROROAS TO THE ACTING SECRETARY OF THE DEPARTMENT OF WAR DATED FEBRUARY 11, 1801, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 18-19 NATIONAL ARCHIVES

Brother,

About thirty five years since, our Nation migrated from North Carolina; they there left a tract of land of ten miles square on the Roanoke, which was reserved for the benefit of the Nation: there were about one hundred souls of us who went northward and placed ourselves under the protection of the Six Nations; a few of our people remained on the reservation. I learnt yesterday from Judge Stone, Representative from North Carolina, that the right to this land still remains in our Nation, the State having prohibited by law the Sale of it to any individual, declaring that it should be for the benefit of the Nation. I also learn that there are but two men and three children of ours now on this tract. We are three hundred and suppose ourselves to be the lawful owners of this property. Judge Stone told me that if we would send a Deputy to North Carolina about the first of November next when the Legislature will be in session, he had not a doubt they would take the rightfulness of our present existing claim into consideration, and if they thought it still valid, as he does, would make us compensation for it.

I therefore wish the President to give us his advice and assistance in the sale of this tract, that we may get other Land for it in the neighborhood of our present residence; and also to inform us whether the United States will pay the expence of our Deputy's Journey.

Taken from the interpretation of Mr. Jasper Parrish in presence of Mr. Chapin, Agent of United States to the Six Nations

signed In Newman Chief Clerk Dept. War

Witness

his
Sacca X reesa
mark

Washington
Feb. 11 1801
Jasper Parrish

Ex. No. G

{ 172 }

Exhibit 232 8306–8307

13

SPEECH BY THE ACTING SECRETARY OF THE DEPARTMENT OF WAR TO SACCOREESA, A CHIEF OF THE TUSCAROORAS, DATED FEBRUARY 16, 1801, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 22-23 NATIONAL ARCHIVES.

Brother,

The President has read your speech made on Wednesday last, and does not object to your endeavoring to obtain an equivalent in money or in land, nearer to your present residence for the reserved tract on the River Roanoke, in North Carolina, to which you suppose your nation still to retain a Right and he is inclined to do everything that he can do with propriety to help you in it; and if it should be necessary for him to appoint some person to be present and consent to the bargain you make, he will do so. As however, it is a business entirely between you and the State of North Carolina, the President does not think himself authorised to agree that the United States should pay the expense that will attend your sending a Deputy to the Legislature of that State at their next Session; or the expense of an Agent to be present on the part of the Government of the United States.

Given at the War Office

City of Washington

February 16th 1801

(Signed) Sam Dexter

15

SPEECH BY SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO SACCOREESA, A CHIEF OF THE TUSCARORAS, DATED NOVEMBER 2, 1801, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 113-114, NATIONAL ARCHIVES.

Friends and Brothers

Your father, the President of the United States instructs me to say to you that he is happy in finding that the Great Spirit has preserved your nation, and vouchsafed to you his protection thus far on your journey.

Brothers.

You may rest assured that the President feels deeply interested in the happiness of the Tuscaroras and all the other red people of the United States, and that he considers them all as a part of his great family.

He will at all times, with great pleasure give them every aid in his power, so long as they shall continue to conduct themselves fairly and honestly towards each other, and their white neighbors.

Brothers.

The President will send a good man with you to assist you on your way to North Carolina, whither you are going on business for your nation, and will appoint a great and good man in that state, to advise and assist you,

When you shall have expended the money which your nation collected and gave you for your travelling expences, the President will order a reasonable sum to be furnished you to enable you to pursue your journey, in the full persuasion that you will not expend more than you may find really necessary.

The President will be happy to see you on your return, and most heartily wishes you a safe journey, and a happy issue to the business in which you are engaged.

Signed

Henry Dearborn
Secretary at War

War Department
2d November 1801.

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LETTER FROM SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO WILLIAM R. DAVIE, DATED NOVEMBER 3, 1801, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 117-119 NATIONAL ARCHIVES

Sir,

I have the honor of enclosing herewith a commission, by which you are authorised to act as Commissioner of the United States in a negotiation, which the Tuscarora nation of Indians wish to open with the State of North Carolina for the sale of a tract of land of ten miles square on the River Roanoke in that State, which the deputation now on their way represent to have been reserved for the benefit of that Nation on the migration of the major Part of them thence about thirty five years since.

The Government of the United States are not sufficiently acquainted with the circumstances to give an opinion on the validity of the present claim which the Tuscarora Nation may have to the tract in question, but disposed to aid their Indian neighbours in a just pursuit of a lawful claim, it is thought proper to have a commissioner present at the negotiation, to give the consent of the United States to the completion of the bargain, if the Representatives of the State of North Carolina and the Indian Deputation should agree upon terms.

The deputation state that from the best information they have been able to procure, the remains of that part of the nation which continued on the reserved tract consist now or lately consisted but of two men and three children. These and more if more should on investigation be found there, they are willing to take with them to the Country which their Nation now inhabit; and are also desirous of admitting the men as parties with themselves in the expected negotiation.

Their object is to procure money from the State of North Carolina, for the cession or sale of their right to

the before mentioned tract, and with it to purchase lands adjacent to those on which they now reside.

You are authorised and requested to attend the conferences between the agents or Rèpresentatives of the State of North Carolina, and the Indian deputation on the business, to see that the Indians be fairly and equitably dealt with, and to give the consent and sanction of the United States, so far as the same may be necessary, to all things that may according to the laws and constitution be done in the premises.

Your compensation will be eight dollars per day from the time of your leaving home on the business until your return and your actual and necessary expenses will be reimbursed.

I have the honor

H. D.

19

A TALK DELIVERED BY THE SECRETARY OF THE DEPARTMENT OF WAR TO SACCOREESA AND THE OTHER CHIEFS OF THE TUSCARORAS ON FEBRUARY 2, 1802, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 147-148 NATIONAL ARCHIVES.

Brothers,

I have made your Father the President of the United States acquainted with all that you said to me the other day on the subject of your lands in North Carolina and also of the lands in Virginia all of which he has fully considered.

Brothers,

Your Father the President has authorised me to assure you that he feels in his heart a strong friendship for his red children the Tuscaroras and that he will always be ready to give them all the friendly assistance in his power. He is grieved at your not having been able to accomplish your business after so long and expensive a journey.

Brothers,

The President cannot interfere in the business between your Nation and the State of North Carolina in any other way than he has already done; but he will continue to afford you such aid as is in his power, he cannot pay however any large sums of money.

Brothers,

I advise you on your return to your nation to lay before them all that you have done, and inform them how much money you have expended, that the Nation may consider whether it will be proper for you to make another journey, and if they should conclude that it will be best for you to try once more that they and you will consider of the expense, and not send anyone with you except an Interpreter, and when you arrive at this place, Capt. Lunt, or some other

good man will be sent with you, with such other advice and assistance as the President shall have the power to afford you.

Brothers,

When you shall be prepared to set out on your journey home, I hope that the Great Spirit will take care of you on your way, and enable you to return in safety to your firesides, and find all your friends alive and in good health.

Given at the War Office of the United States at the City of Washington this
(L. S.) 4th day of February 1802.

H. Dearborn
Secretary of War.

A TALK DELIVERED BY THE SECRETARY OF THE DEPARTMENT OF WAR TO TUSCARORA CHIEF LONGBOARD ON NOVEMBER 28, 1803, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 398-401 NATIONAL ARCHIVES.

At a Conference held on the 28th day of November 1803 between the Secretary for the Department of War and Longboard, a Chief of the Tuscarora Nation thro his Interpreter, the following communications in substance were made.

Longboard

Brother!

I am deputed by the Chiefs of the Tuscarora Nation of Indians to visit our Father the President of the United States, and you our good friend to make known to you the wishes of my brethren in relation to the avails of the land lying in the State of North Carolina, formerly belonging to your friends the Tuscarora's; and to consult with you on our common interest as one great family.

Brother!

The Tuscarora's wish from the avails of the land sold in North Carolina to purchase about five miles square of the Holland Company, joining to, and running parallel with the lands now possessed and occupied by the Tuscarora Nation. To effect this object they wish you Brother to deposit the money which will be sent you by the Agent for the Tuscaroras in North Carolina, in the Bank of the United States, and have it safely kept until a bargain can be made for the lands belonging to said company.

Brother!

I am also instructed by my brethren of the Tuscarora's to say, that they have perfect confidence in their Father the President of the United States, that he has evinced his

paternal concern for them, in such manner, as to rivet their affections to him forever. And also having received from you brother such repeated proofs of friendship and care; they freely commit to you the further management of all their concerns in North Carolina. They wish you to communicate to them from time to time thro the Agent who may be appointed to the Tuscarora's such things as may be necessary for them to know in relation to the business alluded to.

Brother!

As an evidence not only of the powers vested in me by my Brethren, but also as an evidence of their unwavering friendship for the United States I present you this *string*. A string of Wampum.

The reply of the Secretary of War.

Brother!

I have heard with attention your talk in behalf of yourself and your brethren of the Tuscarora Nation! and it will afford me satisfaction to communicate to your Father and friend, the President of the United States, the amicable disposition evinced by you towards him. As to myself I thank you and your brethren for your expressions of friendship, and shall continue with pleasure to do all in my power to carry your and their laudable views and wishes into effect. I will receive the money which may be transmitted by your Agent in North Carolina, and have it safely lodged in the Bank, where it will rest until it can be applied to the object contemplated by you; to effect which I will immediately write to the Agent for the Holland Company, and learn from him, whether he is authorised and disposed to sell any of the land belonging to the concerned, and the quantity and rate at which it may be purchased the result of which I will forward to the Agent, who may be appointed for your Nation to be communicated to you. I will also with pleasure extend my care and attention to your con-

cerns in North Carolina, and cause your business to be conducted in such manner as shall be most conducive to your interest.

Brother!

I wish when you return you would confer with each other in relation to a Blacksmith, and determine whether in your judgement the Blacksmith which now belongs to your nation, will be able to perform all your work as soon as the result of your enquiries on the subject shall be made known to me I will immediately adopt measures for your supply.

Brother!

May the Great Spirit take you safely back and give you a happy meeting with your family and friends.

H. Dearborn.

LETTER FROM SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO JOSEPH ELLICOTT, DATED NOVEMBER 29, 1803, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," P. 402 NATIONAL ARCHIVES.

Sir,

A Chief of the Tuscarora Nation specifically deputed for the purpose, has made application for the purchase of a quantity of land belonging to the Holland Company, and joining upon that now in the possession and occupancy of the Tuscaroras.

The object I presume is to purchase about as much as they now possess, and lying in the same geographical form, say two by three miles. Should terms be agreed on, they will be in possession of funds from the avails of their lands sold in North Carolina, to meet such payments as may be stipulated. I have to request of you to inform me whether such a quantity might be obtained from the Holland company —the rate per acre, and periods of payment, and in fact such information on the subject as may serve as a basis of negotiation for a sale and purchase. Will you favor me with a speedy answer?

I am, etc.

LETTER FROM SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO PAUL BUSTI, DATED JANUARY 16, 1804, FOUND IN VOLUME A "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 425-426 NATIONAL ARCHIVES.

Sir,

Your favor of the 9th instant with the papers accompanying it have been duly received—And to prevent any unnecessary delay on the subject of your letter, I have taken the earliest opportunity for considering the same and for taking such measures as the nature of the case appears to require—From several conversations I have held with the Chiefs of the Tuscarora Tribe, I am convinced that the local situation of the land proposed to be sold them will not fully accord with their views, I therefore wish that the Lots I have marked with a cross may be added to the number from which they may be permitted to make their selection—And if agreeable to them I would advise them to take the fourteen Lots (excepting a small part of Lot No. 61.) within the pencil line drawn round them—

But my advising them or not will depend on my being convinced the ultimate price is a fair one—at present I am of opinion that the prices marked on the plan are considerably too high. The Tuscaroras have a fund amounting to upwards of fifteen thousand dollars, which they wish to vest in lands— the fund consists in Bonds and Notes the Nation have against individuals in the State of North Carolina, which are said to be good and secure, and which I presume will be punctually paid by instalments as specified in the obligation (Viz) upwards of five thousand dollars payable in June next and an equal sum annually (in June) the two succeeding years—Whatever engagements shall be entered into between said Indians or myself on their behalf and the Holland Company, must rest as to payments on the above mentioned fund. I shall take meas-

ures as early as practicable, for completing the business on behalf of the Tuscaroras, after knowing the ultimate terms—presuming that in the meantime such attention as to the situation of the land will be made as will be satisfactory to the Indians and that the price will be fixed considerably lower than what is marked on the enclosed plan—

I am, etc.

LETTER FROM SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO JEREMIAH SLADE, DATED FEBRUARY 15, 1804, *FOUND IN VOLUME A* "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," PP. 438-439 NATIONAL ARCHIVES.

Sir,

Your letter of the 7th ultimo has been duly received and considered. If there is no prospect of obtaining any better terms than those proposed by General Williams, for a commutation of the leases of Jones, Pugh and Williams, it may be, and I am of opinion it will be prudent to close with them; calculating the prices offered on the whole tract as surveyed, you will be able to decide whether the probability of obtaining more advantagious terms for the poor Indians, is such as ought to induce a further delay. Having given the subject a deliberate consideration, you will please to act in the premises, in such manner as in your judgment shall best subserve the interest of those for whom you are acting as confidential Agent.

As I have it in contemplation, at the request of the Tuscaroras, to vest the avails of their land in North Carolina, in lands more conveniently situated to where they now reside, I wish you to inform me as soon as may be, whether I may count with absolute certainty on the punctual payments of the bonds deposited in your hands for collection—

I am, etc.

LETTER FROM ERASTUS GRANGER TO HENRY DEARBORN, SECRETARY OF THE DEPARTMENT OF WAR, DATED JULY 20, 1804, FOUND IN MANUSCRIPT FILES, BUFFALO HISTORICAL SOCIETY.

Buffalo County
July 20th 1804

Sir

I have been for a long time confined to my room with a slow billious intermittent fever this has prevented my writing sooner on the subject of the Contract for Land between the Holland Co. and the Tuscarora Indians—

I have taken every measure in my power to obtain a reduction of the price but can not prevail on the agent to make any abatement from the price affixed to the lots on the Map which you presented me at Washington.

Indeed I am convinced that the price is as low as single lots are selling in that part of the purchase to actual settlers—

The Lots adjoining the Tuscarora Reservation on the North are selling from 4 to 5 Dollars pr. acre.

The following lots have been selected between Mr. Ellicott & myself—they include a choice Body of land and lie compact adjoining their other lands.—

	No.					Dolls	
Lot—	17	containing	315	acres	at 4—	pr acre	
"	16	"	376	"	" 4	" "	
"	10	"	383.23/100	"	" 4	" "	
"	9	"	365.55/100	"	— 4	" "	
"	3	"	428.41/100	"	— 4	" "	
"	2	"	352.76/100	"	— 4	" "	
			2221.15/100		at 4		$8884.60
"	61	"	188	3.50/100			
"	60	"	223.37/100	3.50			
"	59	"	307.98/100	3.50			
"	58	"	308.35/100	3.50			
			1027.72 at	3.50	.....		3597.03
"	52	"	360	3.25/100			
"	51	"	360	3.25			
"	50	"	360	3.25			
			1080	$3.25	.....		3510—
							$15,991.68

amount brot over	$15991.63
Deduct 14 pr cent	2238.83
	$13752.80

The foregoing sum of $13752.80 to be paid as follows one third the first day of Oct next—one third 1 Oct 1805 and the remainder 1 Oct 1806—Interest on the two last payments from the 1st of Oct next.—The foregoing are the best terms I can obtain—The Indians are satisfied with the price and wish the purchase to be made—Mr. Ellicott proposes that if you think proper to acceed to the terms that the contract be completed between you & the General Agent Mr. Busti at Philadelphia—The Indians are willing the Land should be held in trust by the Secy of War for the time being for their benefit.—

I am sir your Most

Obet Humble Servt

E. Granger

EXCERPT FROM JOURNAL OF GERARD T. HOPKINS, UNDER DATE OF MAY 12, 1804, MEMBER OF A COMMITTEE SENT IN MAY 1804 FROM THE BALTIMORE YEARLY MEETING OF THE SOCIETY OF FRIENDS TO VISIT VARIOUS INDIAN TRIBES. (6 PUB. BFLO. HIST. SOC. 221).

Being at leisure we accompanied the Indian Agent [Erastus Granger] in a ride, four miles above Buffalo Creek, to an Indian village of the Senecas, one of the tribes of the Six Nations. . . . Here we met with Saccarissa, a principal chief of the Tuscarora tribe. He has come for the purpose of being assisted by the agent in vesting fifteen thousand dollars in the purchase of land from the Holland Land Company. They have greatly declined hunting, and are becoming agriculturists. The Tuscarora Indians removed from North Carolina many years ago, and were received into the then Five Nations, or Iroquois Indians, who gave them a small tract of country, which they now think wants enlarging.

LETTER FROM HENRY DEARBORN, SECRETARY OF THE DEPARTMENT OF WAR TO ERASTUS GRANGER, DATED NOVEMBER 28, 1804, FOUND IN VOLUME B "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," P. 29 NATIONAL ARCHIVES.

Sir

The bargain has been closed with Mr. Busti Agent for the Holland Company for the lands you agreed for on the part of the Tuskarora Indians and I have received a Deed of the same by which I am to hold the lands in trust for said Nation, and have made the first payment therefor with the money which had been rec'd for their lands in North Carolina—You will therefore inform the Chiefs they may take possession of and occupy said lands as those of their Nation—I have paid as the first instalment all the money which has been rec'd on acct. of their lands in North Carolina, and shall continue to make the payments each year as soon as the money shall be rec'd from North Carolina, until the whole purchase money shall be completed—and will then render an Acct. to said Nation of all the monies rec'd on acct. of their lands in the State aforesaid, and of any balance that may remain after completing the payments for the land purchased of the Holland Company—The lots conveyed by the deed are as follows:

[LIST OMITTED]

LETTER FROM SECRETARY OF DEPARTMENT OF WAR, HENRY DEARBORN, TO PAUL BUSTI, DATED JANUARY 23, 1807, FOUND IN VOLUME B "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," P. 274 NATIONAL ARCHIVES.

Sir,

I have received information of the receipt of a sum of money for the Tuscaroras in North Carolina—and expect it will arrive here in a few days—of which you will be notified without loss of time. In the meantime you will oblige me by forwarding a statement of what the balance will be on the last day of this month for completing the payment for the lands sold by the Holland Company to said Indians.

I am respectfully, etc.

DEED OF CONVEYANCE OF 4,329 ACRES FROM HOLLAND LAND COMPANY TO HENRY DEARBORN, SECRETARY OF THE WAR DEPARTMENT, IN TRUST FOR THE TUSCARORA INDIANS, DATED NOVEMBER 21, 1804, RECORDED IN LIBER B, PAGES 2-7, NIAGARA COUNTY CLERKS OFFICE, LOCKPORT, NEW YORK.

This Indenture, made the twenty-first day of November, in the year of our Lord One thousand eight hundred and four between Wilhelm Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhelm Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye, all of the City of Amsterdam in the Republic of Batavia by their Attorney Paul Busti of the City of Philadelphia in the commonwealth of Pennsylvania by them for this among other purposes duly constituted by Letters of Attorney under their hands and seals duly executed bearing date the sixth day of October Anna Domini One thousand eight hundred and two, recorded in the Secretary's office of the State of New York in Liber deeds endorsed M, Page 527 and also recorded in the clerk's office for Genesee County in the said State of New York in Liber A of miscellaneous records, pages 11 and 15 of the one part, and Henry Dearborn Esquire, secretary to the War Department of the United States of the other part, whereas, the said Wilhelm Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhelm Willink, the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye, by their said Attorney, the said Paul Busti have agreed to sell to the said Henry Dearborn in Trust for the Tuscarora Nation of Indians, the lands hereinafter described and granted for the price or sum of thirteen thousand seven hundred and fifty two Dollars and eighty cents lawful money of the United States to be paid in the following manner, To wit, the sum of four thousand six hundred and seventy Dollars and sixty eight cents at the time of the Execution of these presents, the sum of four thousand four hundred and

MR

ninety-seven Dollars and eighty five cents on the first day of October which will be in the year of our Lord one thousand eight hundred and five together with lawful interest thereon from the first day of October now last past and the sum of four thousand five hundred and eighty four Dollars and twenty seven cents on the first day of October which will be in the year of our Lord one thousand eight hundred and six, together with lawful interest thereon from the first day of October now last past, and that the payment of the said two last-mentioned sums of money with interest be secured by a mortgage of the said lands to be executed by the said Henry Dearborn. Now this Indenture Witnesseth that the said Wilhelm Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhelm Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye, as well for and in consideration of the sum of four thousand six hundred and seventy Dollars and sixty eight cents lawful money of the United States to him well and truly paid by the said Henry Dearborn at or before the sealing and delivery hereof the receipt whereof is hereby acknowledged as of the sum of four thousand four hundred and ninety seven Dollars and eighty five cents money aforesaid to them to be paid on the first day of October which will be in the year of our Lord one thousand eight hundred and five together with lawful interest for the same to be computed and reckoned from the first day of October now last past, and of the sum of four thousand five hundred and eighty four Dollars and twenty seven cents money aforesaid to them to be paid on the first day of October which will be in the year of our Lord one thousand eight hundred and six together with lawful interest for the same to be computed and reckoned from the first day of October now last past. Have granted, bargained and sold, aliened, enfeoffed, released and confirmed and by these presents Do grant, bargain and sell, alien enfeoff, release and confirm unto the said Henry Dearborn his Heirs and Assigns all those thirteen several lots or pieces of land situate, lying and being in

the County of Genesee in the State of New York and more particularly described as follows to wit, Lot number two of the fourteenth Township in the ninth Range of Townships, Containing three hundred and fifty two acres and ninety six one hundredth parts of an acre, Lot number three of the same Township in the same Range, Containing four hundred and twenty eight acres and forty one one hundredth parts of an acre, Lot number nine of the same Township in the same Range, Containing three hundred and sixty five acres and fifty five one hundredth parts of an acre, Lot number ten, Containing three hundred and eighty three acres and twenty three one hundredth parts of an acre situate in the same Township in the same Range, Lot number sixteen of the same Township in the same Range, Containing three hundred and seventy six acres, Lot number seventeen of the same Township in the same Range, Containing three hundred and fifteen acres, Lot number fifty, fourteenth Township in the eighth Range of Townships, Containing three hundred and sixty acres, Lot number fifty one of the same Township in the last mentioned Range, Containing three hundred and sixty acres, Lot number fifty two of the same Township in the last mentioned Range, Containing three hundred and sixty acres. Lot number fifty eight of the same Township in the last mentioned Range, Containing three hundred and eight acres and thirty five one hundredth parts of an acre, Lot number fifty nine of the same Township in the last mentioned Range, Containing three hundred and seven acres and ninety eight one hundredth parts of an acre, Lot number sixty of the same Township in the last mentioned Range, Containing two hundred and twenty three acres and thirty nine one hundredth parts of an acre and Lot number *sixty one of the* same Township in the last mentioned Range, Containing *one hundred and eighty eight acres* the said six first described lots to wit, Lots number Two, Three, Nine, Ten, Sixteen and Seventeen being situate in the fourteenth Township in the ninth Range of Townships and the said seven last described lots to wit, Lots number Fifty, Fifty one,

Fifty two, Fifty eight, Fifty nine, Sixty and *Sixty one being* situate in the fourteenth Township in the eighth Range of Townships in the said County of Genesee. Together with all and singular the Ways, Woods, Mines, Minerals, Fossils, Quarries, Ores, Savannas, Marshes, Waters, Water Courses, Rights, Liberties, Privileges, Hereditaments, and Appurtenances whatsoever unto the said above mentioned and described thirteen several lots or pieces of land respectively, belonging or in anywise appertaining and the Reversion and Reversions, Remainder and Remainders, Rents, Issues and Profits thereof and of every part and parcel thereof and also all the Estate, Right, Title, Interest, Use, Possession, Property Profit, Claim and Demand whatsoever of them, the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhem Willink, the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye at Law and in Equity or otherwise howsoever of in and to the same and every part and parcel thereof with the Appurtenances to have and to hold the said above mentioned and described thirteen several Lots or pieces of land, Hereditaments, and premises hereby granted or mentioned or intended to be hereby granted with the respective Appurtenances unto the said Henry Dearborn and to his Heirs and Assigns to the only proper use of the said Henry Dearborn, his Heirs and Assigns forever in Trust to and for the only proper use, Benefit and Behalf of them the said Tuscorora Nation of Indians and their Assigns forever, and in Trust that he, the said Henry Dearborn and his Heirs grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscorora Nation of Indians shall at any time hereafter direct and appoint. And to and for no other Use, Intent or purpose whatsoever and the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhem Willink, the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye for themselves and their respective Heirs do

covenant and agree to and with the said Henry Dearborn his Heirs and Assigns in manner following, that is to say that they the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhem Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye now are lawfully siezed of a good sure perfect and indefeasible Estate of Inheritance in fee simple of and in the thirteen several lots or pieces of land and premises before mentioned and described without any manner of condition, mortgage Limitation of use or uses or other matter, cause or thing whatsoever to alter, change, charge or determine the same or in any wise to encumber the same and have good right or full power and lawful authority to grant, sell and convey the same unto the said Henry Dearborn, his Heirs and Assigns to and for the use Trusts and purposes aforesaid forever, and further the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhem Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven and Hendrik Seye and the survivors and survivor of them and the Heirs of such survivor shall and will from time to time and at all times hereafter upon the reasonable request and at the proper costs and charges in the Law, of him the said Henry Dearborn, his Heirs or Assigns, make, execute and deliver, or cause to be made, executed and delivered unto the said Henry Dearborn, his Heirs and Assigns all such further and other Acts, Deeds, Conveyances and Assurances in the Law whatsoever for the better and more perfect granting, conveying, assuring and vesting the thirteen several Lots or pieces or parcels of land and premises before mentioned and described in him the said Henry Dearborn, his Heirs and Assigns to and for the Uses, Trusts and Purposes aforesaid as he the said Henry Dearborn, his Heirs or Assigns or his or their Counsel learned in the law shall reasonably devise, advise or require. And the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkin-

ninck, Wilhem Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Von Stophorst, Cornelius Vollenhoven and Hendrik Seye and their respective Heirs the said thirteen several Lots or pieces of land and premises hereby granted or mentioned or intended to be hereby granted with the respective Appurtenances unto the said Henry Dearborn, his Heirs and Assigns against them, the said Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelkinninck, Wilhem Willink the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Stophorst, Cornelius Vollenhoven, Hendrik Seye and the survivors and survivor of them and against the Heirs of such survivor and against all and every other person and persons whatsoever lawfully claiming or to claim any estate Right, Title or Interest whatsoever of in and to the hereby granted thirteen several lots or pieces of land and premises or any part thereof shall and will well and truly Warrant and, and forever defend by these presents.

In Witness whereof the said parties to these presents have hereunto interchangeably set their Hands and Seals, Dated the Day and Year first above written.

Sealed and delivered
in the Presence of

J. J. Vanderkemp
A. De France
George A. Baker

Wilhem Willink	L. S.
Peter Van Eighen	L. S.
Hendrik Vollenhoven	L. S.
Rutger Jan Schimmelkinninck	L. S.
Wilhem Willink the younger	L. S.
Jan Willink the younger son of Jan	L. S.
Jan Gabriel Van Stophorst	L. S.
Cornelius Vollenhoven	L. S.

Hendrik Seye

By their Attorney
Paul Busti

LETTER FROM HENRY DEARBORN, SECRETARY OF THE DEPARTMENT OF WAR TO ERASTUS GRANGER, DATED JANUARY 2, 1809, FOUND IN VOLUME B "LETTERS SENT BY THE SECRETARY OF WAR RELATING TO INDIAN AFFAIRS," P. 421, NATIONAL ARCHIVES.

Sir,

I have executed a deed to the Tuscarora nation of the lands purchased for them of the Holland company which will be forwarded to you; for the purpose of being duly recorded in the proper office as soon as I can make an acknowledgment before one of the judges of the supreme court of the U. S.—You will please to apply to the Agent of the company to have the lines enclosing the whole of the lots duly run and strongly marked with good durable corner bounds, and have the business completed as soon as practicable.

It would be well for you to aid the nation in a petition to the legislature of the state of New York to hold their lands in a national capacity.

I am very respectfully sir your Ob. Sevt.
H. Dearborn

DEED OF CONVEYANCE OF 4,329 ACRES FROM HENRY DEARBORN, SECRETARY OF THE WAR DEPARTMENT TO TUSCARORA INDIANS DATED JANUARY 2, 1809. RECORDED IN LIBER A, PAGE 5, NIAGARA COUNTY CLERK'S OFFICE, LOCKPORT, NEW YORK.

To all to whom these presents shall come Whereas by a certain Indenture bearing date the twenty first day of November in the year one thousand eight hundred and four Between Wilhem Willink, Peter Van Eighen, Hendrik Vollenhoven, Rutger Jan Schimmelpenninck, Wilhem Willink, the younger, Jan Willink the younger son of Jan, Jan Gabriel Van Staphorst, Cornelius Vollenhoven and Hendrik Seye all of the City of Amsterdam in the Batavian Republic, by their attorney Paul Busti of the City of Philadelphia in the Commonwealth of Pennsylvania by them for this among other purposes duly constituted by letters of attorney, under their hands and seals duly executed bearing date the sixth day of October A. D. 1802 Recorded in the Secretary's of the State of New York in liber deeds, endorsed M R

M page 527 and also recorded in Clerks Office for Genesee County in the said State of New York in Liber A of Miscellaneous Records pages 11 and 15 of the one part, and Henry Dearborn Esquire Secretary to the War Department of the United States of the other part duly executed and acknowledged by their said attorney Paul Busti on the said 21st day of November 1804 before Bushrod Washington Esquire one of the Judges of the Supreme Court of the United States and recorded in the Clerk's Office for Genesee County the 30th day of April A. D. 1805 at 3 o'clock P. M. in Liber 1 of the Record of Deeds for Genesee County page 82 etc. they the said Wilhem Willink, Peter Van Eighen Hendrik Vollenhoven, Rutger Jan Schimmelpenninck, Wilhem Willink the younger, Jan Willink the younger son of Jan, Gabriel Van Staphorst, Cornelius Vollenhoven and Hendrik Seye for certain good and valuable considerations in the said Indenture mentioned did grant bargain and sell alien enfeoff release and confirm unto the said Henry Dearborn his heirs and assigns for ever. *All those thirteen several* lots or pieces of land situate lying and being in the County of Genesee in the State of New York and more

particularly described as follows to wit: Lot number two of the fourteenth Township in the ninth range of Townships containing three hundred and fifty two acres and ninety six one hundredth parts of an acre Lot number three of the same Township in the same range containing four hundred and twenty eight acres and forty one one hundredth parts of an acre. Lot number nine of the same Township in the same range containing three hundred and sixty five acres and fifty five one hundredth parts of an acre. Lot number ten containing three hundred and eighty three acres and twenty three one hundredth parts of an acre situate in the same Township in the same range. Lot number seven sixteen in the same Township in the same range containing three hundred and seventy five acres. Lot number seventeen in the said Township in the same range containing three hundred and fifteen acres. Lot number fifty, fourteenth Township in the Eighth Range of Townships containing three hundred and sixty acres. Lot number fifty one of the same Township in the last mentioned range containing three hundred and sixty acres. Lot number fifty two of the same Township in the last mentioned range containing three hundred and sixty acres. Lot number fifty eight of the same Township in the last mentioned range containing three hundred and eight acres and thirty five one hundredth parts of an acre. Lot number fifty nine of the same Township in the last mentioned range containing three hundred and seven acres and ninety eight one hundredth part of an acre Lot number sixty of the same Township in the last mentioned range containing two hundred and twenty three acres and thirty nine one hundredth parts of an acre, and Lot number sixty one of the same Township in the last mentioned range containing one hundred and eighty eight acres The said described lots to wit Lot number two, three, nine, ten, sixteen and seventeen being situate in the fourteenth Township in the ninth range of Townships and the said seven last described lots to wit Lots number fifty, fifty one, fifty two, fifty eight, fifty nine, sixty and sixty one being situate in the fourteenth Township in the Eighth range of Townships in the said County of Genesee Together with all and singular the ways, woods, mines mine rights liberties privileges hereditaments and appurtenances whatsoever

unto the said above mentioned and described thirteen several lots or pieces of land respectively in belonging or in anywise appertaining. And the reversion and reversions remainder and remainders rents issues and profits thereof and of every part and parcel thereof To have and to hold the said above mentioned and described thirteen several lots or pieces of land hereditaments and premises thereby granted or mentioned or intended to be thereby granted with the respective appurtenances unto the said Henry Dearborn and to his heirs and assigns To the only proper use of the said Henry Dearborn his heirs and assigns for ever. In trust to and for the only proper use and behoof of the Tuscarora Nation of Indians and their assigns for ever, and in trust for the said Henry Dearborn and his heirs grant and convey the same in fee simple or otherwise to such person or persons as the said Tuscarora Nation of Indians should at any time thereafter direct and appoint as by reference to the said Indenture had, will more fully appear Now Know Ye that the said Henry Dearborn for and in consideration of the premises and for and in consideration of one Dollar money of the United States to me in hand paid by the said Tuscarora Nation of Indians on or before the Sealing and delivery of these presents (the receipt whereof is hereby acknowledged Have granted bargained sold aliened enfeoffed and confirmed and by these presents Do grant bargain sell alien enfeoff release and confirm unto the said Tuscarora Nation of Indians and their successors and assigns for ever All the said thirteen several lots or pieces of land situate lying and being in the County of Genesee in the State of New York hereinbefore particularly recited and described Together with all and singular the ways woods, mines, minerals fossels, quarries, Ores, Savannas, Marshes, Waters Watercourses rights liberties privileges hereditaments and appurtenances, whatsoever unto the said above mentioned and thirteen lots or pieces of land respectively belonging or in anywise appertaining And the reversion and reversions remainder and remainders rents issues and profits thereof, and of every part thereof And all the Estate right title interest or claim which I the said Henr. Dearborn my heirs or assigns have or could receive under the Inden-

ture above recited To have and to hold the said above mentioned and described thirteen several lots or pieces of land, tenements, hereditaments and premises with their appurtenances hereby granted or mentioned or intended to be granted unto the said Tuscarora Nation of Indians and their Successors and Assigns for ever to and for the only proper use benefit and behoof of them the said Tuscarora Nation of Indians and their Successors and Assigns for ever. And I the said Henry Dearborn do by these presents covenant that I and my heirs shall and will at any time hereafter, make execute and acknowledge any other instrument or instruments of writing which shall be necessary for the full and complete conveyance in fee simple of the hereditaments hereby granted or intended to be granted or conveyed premises unto the said Tuscarora Nation of Indians their Successors and Assigns And all the Estate right title or claim which I the said Henry Dearborn my heirs or assigns did or could acquire by from or under the Indenture herein above recited And that I the said Henry Dearborn and my heirs will at all times hereafter warrant and defend these presents and the lands and premises with the appurtenances hereby granted or intended to be conveyed unto the said Tuscarora Nation of Indians their Successors and assigns against all claims arising by or from or under me my heirs or assigns. In witness whereof I the said Henry Dearborn have hereunto set my hand and affixed my Seal on this second day of January in the year of our Lord one thousand eight hundred and nine

Henry Dearborn

Signed Sealed and Delivered
in the presence of us

Richard Denmore
Andrew McGary

Received on the day of the date of this instrument in writing of the Tuscarora Nation of Indians the sum of One Dollar of the United States being the consideration money for the above granted or conveyed premises

Henry Dearborn

DEED OF CONVEYANCE OF 640 ACRES FROM SENECA INDIANS TO TUSCARORA INDIANS DATED MARCH 30, 1808, RECORDED IN LIBER 151, PAGES 168-169 NIAGARA COUNTY CLERKS OFFICE LOCKPORT, NEW YORK.

SENECA INDIANS
TO
TUSCARORA INDIANS
} DEED OF GIFT

THIS INDENTURE, Made the thirtieth day of March in the year of our Lord one thousand eight hundred and eight.

BETWEEN The Sachems and Warriors of the Seneca Nation of Indians, of the first part, and The Tuscarora Nation of Indians of the second part.

WITNESSETH, that the said party of the first part for and in consideration of the Love and Affection which they the said Sachems and Warriors of the said Seneca Indians have and bear unto the said Tuscarora Nation of Indians, have remised, released and quit-claimed, and by these presents do release remise and quit-claim unto the said Tuscarora Nation of Indians (in their actual possession now being) and to their assigns forever,

ALL THAT CERTAIN tract of land situate in the town of Erie, County of Genesee and State of New York, and on which part of the said Tuscarora Indians now live, and which said land was reserved by the said Seneca Indians at a Treaty held at Big Tree, with Robert Morris, containing six hundred and forty acres, and being one mile square.

TOGETHER with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and re-

mainders, rents, issues and profits thereof; and also all the estate, right, title, interest, claim or demand whatsoever of them the said party of the first part, either in law or equity, of, in or to the above bargained premises and every part and parcel thereof, to the said party of the second part and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, their assigns forever.

IN WITNESS WHEREOF, the said Sachems and Warriors of the said Seneca Nation of Indians, have hereunto set their hands and seals the day and year first above written.

Sealed and delivered
in the presence of

Erastus Granger,
Indian Agent.

In presence of

Jasper Parrish
John Johnston
Interpreters

Farmers Brother	his mark X	(L. S.)
Red Jacket	his mark X	(L. S.)
Corn Planter	his mark X	(L. S.)
Little Billey	his mark X	(L. S.)
Pollard	his mark X	(L. S.)
Jack Berry	his mark X	(L. S.)
Two Guns	his mark X	(L. S.)
Blue Sky	his mark X	(L. S.)
John Sky	his mark X	(L. S.)
Capt. Hot Bread	his mark X	(L. S.)
Chief Warrior	his mark X	(L. S.)
Half Town	his mark X	(L. S.)
Capt. Shongo	his mark X	(L. S.)
Hot Bread	his mark X	(L. S.)

EXCERPTS FROM JOURNAL OF THE ASSEMBLY OF STATE OF NEW YORK CONCERNING TAXATION OF TUSCARORA LAND IN YEAR 1821.

TUESDAY, JANUARY 23, 1821

The petition of Sacharissa and others, chiefs of the Tuscarora tribe of Indians, praying for the passage of a law exempting them from the payment of certain taxes, which have been assessed, upon lands purchased by the said tribe of the Holland land company, was read and refered to a select committee, consisting of Mr. Hotchkiss, Mr. Huntington and Mr. Burt.

THURSDAY, FEBRUARY 8, 1821

The remonstrance of Ben Barton, and sundry others, inhabitants of the town of Lewiston, in the county of Niagara, remonstrating against the petition of the Tuscarora chiefs which prays for an exemption of the payment of certain taxes, was read and refered to the select committee, to whom was refered the said petition, of which Mr. Hotchkiss was chairman.

THURSDAY MARCH 15, 1821

The petition of Nicholas Cusick and Guy Chew, in behalf of the Tuscarora nation of Indians, praying for an exemption from the payment of certain taxes, assessed upon their lands, was read, and refered to the select committee of which Mr. J. C. Spencer is Chairman.

AN ACT FOR THE RELIEF OF THE TUSCARORA TRIBE OF INDIANS, PASSED MARCH 23, 1821, CHAPTER 146 OF THE LAWS OF NEW YORK OF 1821.

Be it enacted by the People of the State of New York, represented in Senate and Assembly, That a certain tract of four thousand three hundred and twenty-eight acres of land, situate in the town of Lewiston, in the county of Niagara, belonging to the Tuscarora tribe of Indians, and conveyed to them by the Holland land company, be and the same is hereby exempted and exonerated from all assessments and impositions of taxes, for any purpose whatever, so long as the same shall belong to the said tribe of Indians; and that whatever taxes may now be charged on the said land, shall be credited to the county of Niagara, unless the same have been already credited, but no part of the said land shall be sold for the payment of such taxes, and no further proceedings shall be had for the collection of the same.

Exhibit 235 8367

STATE OF NEW YORK

No. 51

IN ASSEMBLY

February 1, 1889.

REPORT

of

SPECIAL COMMITTEE APPOINTED BY THE ASSEMBLY OF 1888 TO INVESTIGATE THE "INDIAN PROBLEM" OF THE STATE.

To the Honorable the Assembly:

The undersigned were appointed by resolution of the Assembly, dated March 21, 1888, a committee with power to sit during the recess of the Legislature and were "charged with the duty of investigating and ascertaining the social, moral and industrial condition of the several tribes of Indians in the State; with ascertaining the amount of land cultivated and uncultivated on their respective reservations; with the investigation of their several tribal organizations and the manner in which they assume to allot their lands among the several members of their tribes; with the investigation of the title to the lands on their several reservations; with the investigation of the claims of the Ogden Land Company to said lands, and the claims of any other companies or organizations or individuals; with the investigation of all treaties made between the State of New York and the Indians therein, and of all treaties made between the United States and said Indians; and with the investigation of such other matters relating to said Indians as will afford valuable aid to the Legislature upon which to base future action."

* * * *

THE TUSCARORA RESERVATION

The committee on arriving at this reservation was met by a large number of Indians of both sexes. They were represented by their attorney, the Honorable John E. Pound, of Lockport. The committee had not proceeded far with its investigation before it discovered that there was an organized movement on the part of some of the Indians to prevent the facts concerning their tribal relations and the management of their national affairs, from coming

to the surface. Whenever, during the examination of a witness, he was inquired of concerning the troubles existing among members of his tribe, or concerning troubles existing between the political parties of the nation, there seemed to be a concerted effort on the part of those belonging to the political party in power to suppress the evidence relative to such inquiries; for this reason the committee experienced no little difficulty in getting at the true situation of affairs.

On this reservation are 409 Tuscaroras and about thirty Oneidas, and their numbers are slowly increasing.

The schools here, two in number, were established and are supported by the State. They are at present taught by Indian women, Miss Emily G. Chew and Miss Tamar T. Johnson. Miss Johnson was educated at the Lockport Union school and Miss Chew at the Thomas Orphan Asylum on the Cattaraugus reservation, and the Forestville Academy. They teach thirty-six weeks a year, in terms of twelve weeks each, and receive therefor six dollars per week. The pupils made more advancement in music and drawing then in any other branches of study, and this seems to be a characteristic of all Indian children. In one of the schools on this reservation there are registered sixty-four pupils and in the other fifty-six, and yet the total average daily attendance is only about thirty-eight. The Indians here, taken as a whole, are more enlightened and better educated than those of any other reservation in the State; as a natural result the schools are in a more advanced and healthy condition, and yet they are far from what they should be. The old pagan spirit is somewhat prevalent on this reservation, and where that exists in any degree its influence is strongly felt against all matters educational and moral.

On this reservation are two churches, a Baptist and a Presbyterian, with native pastors. The Baptist church has almost two hundred communicants, and the Presbyterian about twenty. None of the pagan rites are practiced on this reservation, and most of the Indians call themselves Christians. There are, however, some pagans among them. There seems to exist on this reservation two political parties known as the Administration and anti-Administration.

The government is controlled by chiefs, sixteen in number, selected from the clans, of which there are eight, and chosen by the women of their respective clans. Before a chief so chosen can sit as such, his election must be ratified by a council of chiefs. They elect from their number a head chief, who is called the president of the council. It is pretended that these chiefs are elected for life, but such does not seem to be the case, as many of them have been

deposed. Whether a chief is deposed by the chiefs of the particular tribe to which he belongs or by the chiefs of the Six Nations is not quite clear; it appears, however, that the power to install and depose chiefs rests with the Onondagas, who were at the head of the Six Nations. It is quite apparent that if a chief becomes too modern in his habits and manner of living, or desires a change of government to conform more nearly with that of his white neighbor, he is regarded as a dangerous person and is accordingly deposed. In this way those in power are able to continue in power and thereby perpetuate tribal relations. On this reservation are many deposed chiefs, who, without doubt, are among the most intelligent members of the tribe. During the winter months the chiefs sit in council as a court, where grievances are presented and decided. This is a court of original and general jurisdiction, and its decisions are final.

If the government by chiefs among the Indians could be destroyed, and they could hold their lands in severalty, and be citizens, there is not a doubt but in a very few years they would be thoroughly respectable and enterprising people, and an honor to that part of the country where they live.

This tribe receives no revenue as a nation except the rental of what they term the "national farm" and from what is known as the "wood tax" among them. At one time one of their officers had in his possession quite a sum of money belonging to the nation, which, without any authority, he loaned and eventually lost. He owned and occupied quite a large tract of well-cultivated land; this land he surrendered to the nation in lieu of the money lost. That land is called the "national farm" and is rented to a white man. Upon this reservation the chiefs handle the funds of the tribe, and do all the business; more attention is given to the welfare of the people than is found among other tribes. These people own the larger part of their land in fee, and while it is not divided in severalty among them, as the lands of the Oneidas are, it is patent that their advancement in civilization and their wealth and general prosperity is largely due to the fact that they do own this land in fee; the improvements belong to the individual Indians, and they feel secure in their possessions.

Of their land, in all about 6,249 acres now held by them, there are about 3,500 acres under fair cultivation; about 1,000 acres is woodland, and about 1,750 acres pasture-land or commons. They raise all kinds of farm products. They do not grow as much per acre as their white neighbors, or farm it as well generally, but do much better than most of the other tribes. There are many fine orchards on the reservation, which produce quite a large quantity of fruit.

The lands are allotted to the individual Indians by the chiefs sitting in council. The Indian desiring land, makes application to the council, and if he is of age or is married, he is usually granted a small tract or parcel of land for his occupation and cultivation. The whole matter as to whether the applicant shall receive land, or whether he receive much or little, seems to rest in the discretion of the chiefs. This method of allotment is doubtless intended to conform to the provisions of section o: ' of chapter 175 of the Laws of 1854.

The Onondagas being the recognized head of the Six Nations, and having control of all the important matters of legislation, with power to install and depose chiefs at will, it makes but little difference how well civilized the Tuscaroras may become, so long as they have a tribal government controlled by chiefs, whose chiefs in turn are controlled and governed by the pagan chiefs of the Onondagas.

(543) Portions of the Tuscaroras and Oneidas embarked in canoes upon Oneida lake, down the Oswego river to Fort Niagara, and encamped on the river . In the spring, a part of them returned and a part of them took possession of a mile square upon the mountain ridge given them by the Senecas. This one mile square they have, is in this county and they hold their title from the Seneca nation of Indians. We have a deed from the Seneca nation, if you would like to see it. It is proper for me to say here that our common source of title is the Holland Purchase. In examining the title in the county of Niagara we trace back to Holland Purchase; the Holland Purchase derived their title from the Robert Morris. The Holland Company is a name designating a company formed in Holland, which purchased a large quantity of land in this State of New York. The Holland Company afterwards donated to the Tuscaroras two miles square, adjoining their reservation. This two miles square, however, is reserved for the benefit of the Holland Land Company, to the Tuscarora nation from the Holland Land Company and that is recognized as the title; it is reserved to them for their use. In 1804 they purchased of the Holland Land Company 4,329 acres, the aggregate of several tracts, and is now their present possession. The purchase of the Holland Land Company was made by John Dearborn, then Secretary of War, in trust for the Tuscaroras. The purchase money, $13,722, was a portion of a trust fund held by the United States, in pursuance of the final adjustment of their claims upon North Carolina.

(554) In pursuance of the last adjournment the committee met at the council-house on the Tuscarora reservation, July twenty-seventh, at 10 a. m.

HON. JOHN E. POUND.--Mr. Chairman and gentlemen of the committee: In regard to the schools on this reservation I read from the report of the agent of the New York Indians in the report of the commissioner of Indian affairs, 1887. There are two districts. The number of pupils of school age was 171, and the number of weeks taught was thirty-three; the number attending school some portion of the year, ninety-one, and the average daily attendance thirty; number of teachers two; expenses, $729.04.

The report of Indian affairs for the year 1886, in speaking of the Tuscaroras, says: "The Tuscaroras reside near Niagara Falls. Under the instruction and example of their dead chief, John Mt. Pleasant, they are becoming good farmers, their roads are kept in fine condition, fences good, and there is a general thrifty appearance about their buildings. Several of them harvested from 200 to 500 bushels of wheat."

Also, from the same report there is a statement, showing the reservation to contain 6,349 acres, being nine and three-fourths square miles.

In 1883 there were 415 Tuscarora and thirty-nine Onondaga Indians on this reservation; number of males, 232; females, 222; number of children between six and sixteen years of age, 103; number of Indians who can read English, 155; number of Indians who (555) can read Indian, five; number of Indians who can read over twenty, sixty; under twenty, 100.

In the year 1887 there were 6,000 acres of tillable land on this reservation, of which 5,000 was cultivated. Number of acres under fence was 4,500; number of Indian families engaged in agriculture was 130; Indian labor in civilized pursuits, 100; dwelling-houses built by Indians last year, twelve; number of dwelling-houses occupied by the Indians, 100; number of bushels of corn raised by the Indians, 1000; bushels of vegetables raised, 6,550; number of melons raised by the Indians 3,000; pumpkins, 3,500; tons of hay, 1,500; eighty horses; seventy head of cattle; 300 swine; seventy-five fowls; 1,500 cords of wood cut; 500 pounds of butter made.

JOHN E. POUND, being duly sworn, testified as follows:

Examined by Judge VREELAND:

Q. You are an attorney? A. Yes, sir; counselor-at-law.

Q. And you reside where? A. City of Lockport, N. Y.

Q. Are you the attorney of the Tuscarora Indians? A. In this matter, I act as counsel for them.

Q. Have they any regular attorney appointed by the Governor? A. No, sir; they have not.

Q. Whenever they have legal matters they employ any attorney they see fit? A. Yes, sir.

Q. How long have you been acquainted with the nation? A. Well, intimately connected since the year 1870; acquainted, generally, as long as I have lived.

Q. Have you done some legal business for them prior to this time? A. I have; yes, sir.

(557) Q. Mr. Pound, how do you understand the Tuscarora nation own their land here? A. They hold their lands by virtue of three sources of title; one mile square they hold under a title from the Seneca nation of Indians, which was referred to the other day that was copied by the stenographer, the consideration of which was "love and affection," which the Senecas have for the Tuscaroras; they hold two miles square by virtue of the reservation from the Holland Land Company; it is usually called the donation of the Holland Land Company to the Tuscarora Indians; they hold 4,329 acres by purchase of the Holland Land Company, for which they paid upwards of $15,000; this last portion was held originally by General Dearborn, then secretary of war, in trust for the Tuscarora nation; he afterwards executed his trust and conveyed that portion of their premises directly to them, so that the nation hold that portion of their reservation in fee.

(579) SAMUEL JACOBS, being called as a witness, and having been sworn, testified as follows:

Examined by Judge VREELAND:

Q. Do you understand English pretty well? A. Well, some, not much.

Q. How long have you been on this reservation? A. About seventy years.

Q. Are you a Tuscarora Indian? A. Yes, sir.

Q. Are you one of the chiefs? A. No.

Q. Have you ever been a chief? A. No.

Q. Do you own some land.? A. Yes, sir.

Q. How much? A. About fifty or sixty acres.

Q. Fifty or sixty? A. Yes, sir.

(580)

Q. Do you work it yourself? A. Part of it.

Q. How much do you work? A. About thirty acres.

Q. How much do you rent? A. I rent the place where I used to live.

Q. How much is there of that? A. About fifty acres.

Q. About fifty acres? A. Yes, sir.

Q. Who do you rent it to? A. Truman Dean.

Q. He is a white man? A. Yes, sir.

Q. Does he live upon it? A. No.

Q. Where does he live? A. He lives beside it.

Q. Off of the reservation? A. Yes, sir.

Q. How many years has he got a lease for? A. About wenty.

Q. He has had it twenty years; how long is he going to keep it? A. About twenty years.

Q. How much rent does he pay you for that fifty acres? A. One hundred dollars.

Q. A year? A. Yes, sir.

Q. Does he pay you in money? A. Yes, sir; anything I want.

Q. What do you want? A. Clothing.

Q. He gets your clothes? A. Yes, sir.

Q. Some money? A. Some money if I want it.

Q. When you want anything you call on him and he lets you have it? A. Yes, sir.

Q. Any buildings on it? A. Yes, sir.

Q. Any orchard? A. Yes, sir; some parts orchard.

Q. Do you have a lease with him in writing? A. Yes, sir.

Q. Who made out the lease? A. Myself.

Q. You made it? A. Yes, sir.

Q. You can read and write English, can you? A. Yes, sir; some.

Q. Have you got your lease here? A. No.

Q. Have you got a copy of it? A. No; he has got it.

Q. Have you got any copy of it? A. No; not here.

Exhibit 237

8378

The text of this exhibit appears in the Record at pages 7302 through 7305, stenographer's original page 5202, line 5 through page 5205, line 11 and has been printed for the Court's use.

Exhibit 238

8379

TUSCARORA EXHIBIT NO. 26

Land Contracts
56861-1912
H V C

Leasing
Tuscarora
lands.
H.R.19070

P. R. S. 2579

DEPARTMENT OF THE INTERIOR
WASHINGTON

June 13, 1912.

Mr. Edgar H. Rickard
Secretary for the Tuscarora Nation
R.F.D. No. 19, Lewiston, N.Y.

Sir:

I have received your letter of June 3 making inquiries as to the recent visit of Departmental Inspector McLaughlin to the Tuscarora Reservation regarding the question of the proposed lease to Messrs. Carroll Bros., of Buffalo, N.Y. involving the limestone lands, and requesting to be advised of the nature of said report.

You are advised that under date of May 16 the Inspector submitted a report of the investigation with certain recommendations and the following citations therefrom are given for your information and that of the Tuscarora Indians:

> "In my judgment, a lease of this limestone property on a royalty basis would be preferable and more equitable to both lessors and lessees than a stipulated sum for the desired tract, the product of which is problematical * * * *
>
> "It appears to me that a reasonable proposition which would be fair to all concerned, would be leasing the said tract on a royalty basis, the lease to provide for a reasonable advanced payment, the amount thus advanced to be reimbursed from the royalty of the product as quarried. For instance, to have the lease provide for a $10,000 advanced payment would give the Tuscarora Indians a per capita cash payment of about $28, and the product as produced would provide annual per capita cash payments for the Tuscaroras, so long as the quarries were operated. I would also suggest that the price offered by the Carroll Brothers for the surface holdings, $50 per acre, be only paid to individuals as their holdings are entered upon by the operators, as by receiving the entire amount of $12,000 to be paid to individuals who are recognized

holders of the tracts would not be so beneficial to the individuals as by compensating them for the breaking up of their fields, which are now mostly under a high state of cultivation, and I am confident that the individual holders would appreciate the withholding of the surface price of the lands until they were required for the removal of the limestone lying underneath their cultivated fields."

Thereafter on May 22 the Department submitted a report to the Committee on Indian Affairs, House of Representatives, and urged the enactment of legislation along the lines suggested in its former report of April 4, 1912, as follows:

A BILL

Authorizing the Tuscarora Nation of New York Indians to lease or sell the limestone deposits upon the reservation.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Tuscarora Nation of New York Indians, by their chiefs in council assembled, are hereby authorized and empowered to lease or sell the limestone deposits upon their reservation in one or more suitable tracts, after due advertisement, subject to the approval of the Secretary of the Interior, and under rules and regulations to be prescribed by him.

Regarding the question of jurisdiction, on May 9, 1912, the Attorney General advised this Department that the United States Attorney for the Western District of New York had been directed to notify the Carroll Brothers that the lands could not be leased without the consent of the United States.

In view of all the conditions and the attitude of Congress, past and present, in reference to the New York Indians, you are advised that this Department does not contemplate any further action in connection with the leasing of the Tuscarora lands pending the enactment by Congress of proper legislation to provide therefor.

As the Department is receiving inquiries from time to time from various residents of the Reservation and others as to the status of the matter, you are requested to make the contents of this letter known to as many of your people as can be conveniently gathered together at an early date. The Department appreciates the anxiety of the Tuscarora Indians to lease their limestone lands and will lend every assistance possible to facilitate matters in their interests when the proper authority shall have been conferred by Congress.

Respectfully,

(Signed) Samuel Adams,

First Assistant Secretary

6-GHC-8

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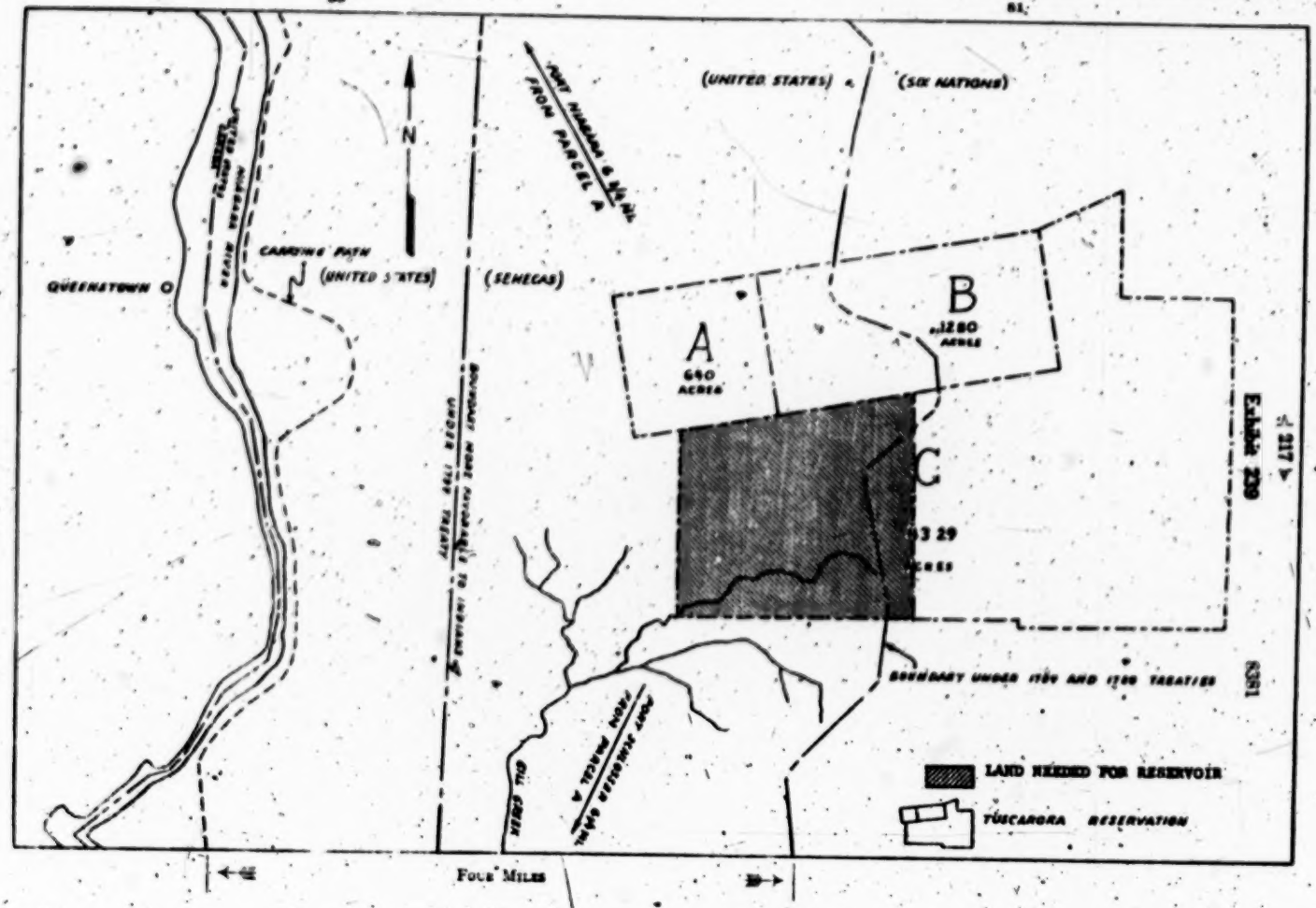

50
51
N
(UNITED STATES)
(SIX NATIONS)
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(UNITED STATES)
CARRYING PATH
QUEENSTOWN
A
640 ACRES
B
1280 ACRES
C
3 29
ACRES
FROM PARCEL A
BOUNDARY UNDER 1784 AND 1794 TREATIES
LAND NEEDED FOR RESERVOIR
TUSCARORA RESERVATION
FOUR MILES
E. LINE 230
817
1961

Exhibit 240

TUSCARORA EXHIBIT NO. 3

Excerpts from reply of George Washington, President of the United States, to the speech of Cornplanter, Half-Town, and Great-Tree, Chiefs and Councillors of the Seneca Nation of Indians, one of the Six Nations, dated December 29, 1790, printed in American State Papers, Indian Affairs, Vol. I, pp. 142-143.

"I, the President of the United States, by my own mouth, and by a written speech, signed with my own hand, and sealed with the seal of the United States, speak to the Seneca Nation, and desire their attention, and that they would keep this speech in remembrance of the friendship of the United States."

* * * * *

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority will not be binding.

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of fort Stanwix, the 22d of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of you. You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declared null and void, so that you may rest easy on that account. But it does not appear, from any proofs yet in possession of Government, that Oliver Phelps has defrauded you.

"If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons. But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you may make.

"It will, however, be important, that, before you make any further sales of your lands, you should determine among yourselves who are the persons among you, that shall give such conveyances thereof as shall be binding upon your nation, and forever prevent all disputes relative to the validity of the sale.

"That, besides the before mentioned security for your land, you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians. For the particular meaning of this law, I refer you to the explanations given thereof by Colonel Timothy Pickering, at Tioga, which, with the law, are herewith delivered to you.

"You have said in your speech that the game is going away from among you, and that you thought it the design of the Great Spirit, that you should till the ground; but before you speak upon this subject, you want to know whether the Union mean to leave you any land to till. You must know, that all the lands secured to you, by the treaty of fort Stanwix, excepting such parts as you may since have fairly sold, are yours, and that only your own acts can convey them away. . . ."

* * * * *

"Remember my words, Senecas! Continue to be strong in your friendship for the United States, as the only rational ground of your future happiness, and you may rely upon their kindness and protection. An agent shall soon be appointed to reside in some place convenient to the Senecas and Six Nations. He will represent the United States. Apply to him on all occasions. If any man bring you evil reports of the intentions of the United States, mark that man as your enemy; for he will mean to deceive you, and lead you into trouble. The United States will be true and faithful to their engagements.

"Given under my hand, and the seal of the United States, at Philadelphia, this twenty-ninth day of December, in the year of our Lord one thousand seven hundred and ninety, and in the fifteenth year of the sovereignty and independence of the United States.

"GEO. WASHINGTON.

"By the President:
"TH. JEFFERSON.
"By command of the President of the United States of America:
"H. KNOX, Secretary for the Department of War."

TUSCARORA EXHIBIT NO. 5

Excerpt from "Proceedings of the Commissioners of Indian Affairs, Appointed by Law for the Extinguishment of Indian Titles in the State of New York", edited by Franklin B. Hough (Albany: Joel Munsell, 1861), p. 419, fn. 1.

"As this is the last Place where the Tuscaroras are mentioned in the Text of this Work, we may notice the Sequel of their Connection with the Oneidas. Upon their Emigration from North Carolina in 1713, and subsequently, they settled at the Oneida Village, Gudaneaka (Chittenango), Oneahoquaga, Chanawke (Chenango), Canneasorake, Kennantats, and a few with the Senecas at Geneseo, 'not as Tenants in common, but as Tenants at will.' In 1780, the British party of these People removed to the Vicinity of Fort Niagara. They subsequently settled on the Mountain Ridge in the Town of Lewiston, where by Donation from the Senecas and the Holland Company, and by Purchase, they acquired 6,249 Acres, which they at present enjoy as Tenants in common and free of Taxes. To this Tract the Tuscaroras, from Time to Time, emigrated from Oneida, and here they now reside."

Exhibit 242

TUSCARORA EXHIBIT NO. 6

Excerpt from Turner, The Pioneer History of the Holland Purchase of Western New York (Buffalo: Geo. H. Derby & Co., 1849), pp. 1d2-3.

"Such portions of the Tuscaroras and Oneidas as had been allies of the English, in their flight from the total route of Gen. Sullivan, embarked in canoes, upon the Oneida Lake, and down the Oswego river, coasted up lake Ontario to the British garrison at Fort Niagara. They encamped during the winter of 1780 near the garrison, drawing a portion of their subsistence, in the form of rations. In the spring a part of them returned, and a part of them took possession of a mile square upon the Mountain Ridge, Given them by the Senecas. The Holland Company afterwards donated to them two square miles, adjoining their Reservation, and in 1804 they purchased of the company four thousand three hundred and twenty-nine acres; the aggregate of which several tracts, is their present possessions. The purchase of the Holland Company was made by Gen. Dearborn, then Secretary of War, in trust for them. The purchase money, $13,722, was a portion of a trust fund held by the United States, possessed in pursuance of a final adjustment of their claims upon North Carolina.

"They thus became residents in this region seventeen years previous to the advent of the Holland Company, and nineteen or twenty years before the settlements by the whites commenced."

Exhibit 243

8386
TUSCARORA EXHIBIT NO. 7

Excerpt from Royce, Indian Land Cessions, 18th Annual Report of the Bureau of American Ethnology, Part 2 (Washington: Govt. Print. Of., 1899), p. 773.

"The Tuscarora removed in 1780 from Oneida and settled on the site of this reserve. Here the Seneka gave them 1 square mile of land, commonly known as the Seneka grant. It was intended to be numbered among the reservations retained by the Indians in the treaty and contract of September 15, 1797, with Robert Morris, but was inadvertently omitted. The Holland Land Company, however (as grantees of Robert Morris), not only recognized the title of the Tuskarora, but gave them 2 square miles adjoining."

Exhibit 244 8387

TUSCARORA EXHIBIT NO. 13

National Archives, Secretary of War, Letters Sent, Indian Affairs, Vol. A, pp. 132-133

From Secretary of War Dearborn to William R. Davie, December 28, 1801.

Sir,

I am honored with your letter of the 15th instant containing a report of your proceedings as Agent of the United States in the negotiation between the State of North Carolina, and a deputation of the Tuscarora Nation of Indians. I have it in charge from the President to express to you his perfect satisfaction with and approbation of the arrangements which you have made in the business.

I am, Sir, etc., H.D.

Exhibit 245

TUSCARORA EXHIBIT NO. 1

National Archives, Secretary of War, Letters Sent, Indian Affairs, Volume A, pp. 284-5

Letter from Secretary of War Dearborn to Wm. R. Davie, October 18, 1802

War Department
18th October 1802

Sir:

The commission which was enclosed you under cover of my letter of the 3d of November last having been made out on the nomination of the President of the United States, is to be considered as merely temporary, and as the said nomination has subsequently been confirmed by the Senate, I have now the honor of forwarding you a permanent one, to be substituted in its place.

A deputation from the Tuscarora nation will leave this city to-morrow on their way to the seat of Government of the State of North Carolina, and I have to request that you will attend on behalf of the United States, such conferences as may be holden between said deputation, and the representatives of said State for the purpose of negotiating the sale of a tract of land lying on the river Roanok, as stated in my letter above alluded to, to which I beg leave particularly to refer you.

As this negotiation has already been attended with very considerable expense to the United States I assure myself that your best endeavors will not be wanting to bring it to a speedy termination.

I have the honor, etc.

Exhibit 246

TUSCARORA EXHIBIT NO. 15

National Archives, Secretary of War, Letters Sent, Indian Affairs, Volume A, p. 285

Letter from Secretary of War Dearborn to Benjamin Williams, Oct. 18, 1802

War Department
18th October 1802

Sir,

A Chief of the Tuscarora nation of Indians, accompanied by an Interpreter has left the Seat of Government for North Carolina for the purpose of making sale or cession of the tract of land claimed by said nation on the river Roanoke, which was the object of the visit of the deputation the last season, but being unsuccessful at that time he wishes now to renew the negotiation.

It is conceived that the authority that he now brings from his nation will be deemed sufficient for authorising the sale.

The Hon. William R. Davie is Commissioner with full powers to attend the negotiation and give the necessary sanction and consent of the United States to such terms as the Legislature of the State or their Agents and the Chief may agree on consistently with the laws and the Constitution.

It is presumed that General Davie's compensation and expenses in attending to the business will be paid by the State of North Carolina.

I have the honor, etc.

Exhibit 247 8390

TUSCARORA EXHIBIT NO. 16

American State Papers, Indian Affairs, Vol. I, pp. 685-686.

["7th Congress.] [2d Session.]

No. 103.

THE TUSCARORAS.

Communicated to the Senate, February 21, 1803.

"Gentlemen of the Senate:

"The Tuscarora Indians, having an interest in some lands within the State of North Carolina, asked the superintendence of the Government of the United States over a treaty to be held between them and the State of North Carolina, respecting these lands. William Richardson Davie was appointed a commissioner for this purpose, and a treaty was concluded under his superintendence. This, with his letter on the subject, is now laid before the Senate for their advice and consent, whether it shall be ratified.

"February 21, 1803. TH: JEFFERSON.

"Articles of a Treaty between the United States of America and the Tuscarora Nation of Indians.

"Whereas a large part of the Tuscarora nation of Indians reside at so remote a distance from the state of North Carolina that they are unable to derive any benefit from the lands, the use of which had been granted to the nation by the Legislature of that State, so long as they should occupy and live upon the same:

"And whereas the Legislature of the State of North Carolina, in directing the use of the said lands, had heretofore permitted certain leases to be made of part thereof, and difficulties have arisen in the payment and receipt of the rents becoming due thereon:

"And whereas, for the purpose of preventing any disputes that might arise respecting the future occupancy of said lands, or the direction of the use thereof, and to remove the difficulties aforesaid, the President of the United States, by and with the advice and consent of the Senate thereof, hath appointed William Richardson Davie, of North Carolina, commissioner on the part of the United States, for the purposes aforesaid; that the said William Richardson Davie, on the part of the United States, and the undersigned chiefs, in their own names, and in behalf of the whole Tuscarora nation, have agreed to the following articles, namely:

"ARTICLE 1. In consideration of the agreement, on the part of the Legislature of the State of North Carolina, that they will, by certain acts of the General Assembly of said State, facilitate the collection of the rents due, or to become due, on the leases of said lands heretofore made; And on the condition that an act or acts of the General Assembly of the said State shall be passed, authorizing the said Tuscarora nation, or the chiefs thereof, in behalf of said nation, to lease, on such terms as they may deem proper, the undemised part of the lands allotted to them in the county of Bertie, in the said State, as well as other parts thereof, now under a lease, or leases, for years, so that the term or terms of the leases made of the whole, or any part thereof, may extend to the 12th day of July, which shall be in the year of our Lord one thousand nine hundred and sixteen:

"And upon condition, also, that the Legislature of the said State shall, by an act or acts, for that purpose, remove, as far as the same can be done by legislative interposition, any difficulties or disputes that might arise respecting the future occupancy of said lands, either by the Indians of the said tribe or nation of Tuscaroras, or their lessees and assigns, until the said twelfth day of July, which shall be in the year of our Lord one thousand nine hundred and sixteen; and also declare and enact, that the occupancy and possession of the tenants, under the said leases, heretofore confirmed by act or acts of the General Assembly, and such leases as may be made under the act or acts made in pursuance of this treaty, shall be held and deemed, in all cases whatsoever, the occupancy and possession of the said Tuscarora nation, to all intents and purposes, as if they, the said nation, or the Indians thereof, or any of them, actually resided on said lands.

"The undersigned chiefs, in their own names, and in behalf of the whole of the Tuscarora nation, hereby stipulate and agree, that, from and after the said twelfth day of July, which shall be in the year of our Lord one thousand nine hundred and sixteen, all the right, interest, and claim, of the said nation, or any of the Indians thereof, by act of the General Assembly of the State of North Carolina, or otherwise, to the use, possession, or occupancy, of a certain tract of land, allotted to them by the Legislature of the said State, situated in the county of Bertie, in the State aforesaid, bounded and described as follows, viz: Beginning at the mouth of Quitsnoy swamp, running up the said swamp four hundred and thirty poles, to a scrubby oak1, near the head of said swamp, by a great spring; then north ten degrees, each eight hundred and fifty poles, to a persimmon tree, in Roquis swamp, and along the swamp and pocoson, main course north fifty-seven degrees west, two thousand six hundred and forty poles, to a hickory on the east side of the F lling run for Deep creek, and down the various courses of the said run, to Moratlock, or Roanoke river; then down the river to the first station; shall cease and determine, and shall be held and deemed extinguished for ever.

"ART. 2. This treaty shall be considered as a final and permanent adjustment and settlement of all differences, disputes, and claims, between the State of North Carolina and the said Tuscarora nation of Indians, as soon as the conditions stipulated in the foregoing article shall be fulfilled on the part of the State of North Carolina, and the treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate of the United States.

"In witness of all and every thing herein contained, the said William Richardson Davie, and the undersigned chiefs, in behalf of themselves and the Tuscarora nation, have hereunto set their hands and seals.

"Done at the city of Raleigh, in the State of North Carolina, on the fourth day of December, in the year one thousand eight hundred and two.

"W.R. DAVIE, [L.S.]
And a number of Indians.

"Halifax, February 3, 1803.

"Sir:

"The severity of the season, and the badness of the roads, prevented my return from South Carolina to this place, before the 21st of January; and I have delayed forwarding the treaty made with the chiefs of the Tuscarora nation of Indians, until I should receive the act passed by the Legislature of North Carolina, to carry the treaty into effect. They are both herewith enclosed, and the commissioners have been appointed by the Governor agreeably to the provisions of the said act of Assembly.

"The agents of the State chose the form of the first article, as you will find it in the treaty, stipulating for the final extinguishment of the Indian claim, in preference to a cession of the lands, on the ground that the Indians had only a kind of usufructuary possession granted to them, so long as they should live upon the same; and that the legal title was, and had always been, in the State; they were substantially the same in effect, and it seems a matter of no moment to the Government of the United States, which mode was preferred.

"By your letter of the 28th of December, 1801, I was informed that the President approved of the arrangement I had made in the business of the Tuscarora lands. I am happy that the benevolent views of the Government, with respect to this nation of Indians, are now completely effected; they will dispose of their lands at their real value, and a little time will also operate an extinguishment of their claim, without any expense to the State or the United States.

"I have the honor to be, &c.

"W.R. DAVIE."

Exhibit 248

TUSCARORA EXHIBIT No. 17

National Archives, Office of Indian Affairs. Letters received by the Secretary of War.

[C O P Y]

Bertie County, North Carolina,
20th June, 1803.

In compliance with a request of General William R. Davie we take the liberty of enclosing you a copy of our report, his Excellency, James Turner, Governor of Carolina. For further information relating to the affairs of the Tuscarora Nation of Indians in this State we beg leave to refer you to documents in the possession of Sacaresa and Longboard, Chiefs of said Nation.

We have the honor to be
Your most obedient and
Humble Sirs

I Slade
William Hawkins
Commissioners for the
Tuscarora Indians

The Honorable
Henry Dearborn, Esq.

[C O P Y]

Indian Woods, Bertie County, 20th June, 1803

We arrived at this place on the 6th of April and entered on the duties of our appointment. Since that period we have caused the lands allotted to the Tuscarora Nation of Indians and all the leases which have been obtained from the said Indians subsequent to the year of 1766 and prior to the 1st of December 1777 to be surveyed.

As we had good reasons to believe that all those leases contained many more acres in their bounds than called for, and as all of them except that confirmed to Robert Jones, William Williams and Thomas Pugh for 1950 years, even if the authorized chiefs demised it advisable to be extended, our object for adopting this plan was not only to ascertain with precision the quantity of undemised lands but also the exact number of acres in each lease in order that the Indians if they did extend ought receive compensation for every acres which would be their property at the expiration of 99 years from the date of the several leases.

The number of acres in the whole tract in each lease with the names of the leases and the quantity called for in their respective leases, and marked in the plan which accompanies this.

The undemised residue amounts to 3,411 acres of which we have leased 2,916 1/2 for $209.66, of which we have received $3,741.51. For the balance we have taken Bonds with good and sufficient securities of which $15,724.56 are to be paid by thru annual installments, the residue of $1,500 on that 15th day of June 1807. The balance of the undemised lands, viz. 495 acres is held as being within the bounds of David Stone Johnstons and McCaskeys leases.

We have extended but one lease containing 117 acres, for which we received $180.17 in prompt payment. We have not commuted the rents arising from any of the leases or settled the arrearages of rents nor could we have acceded to any of the propositions of the leases without doing injustice to the Indians.

After defraying all the expenses of surveying the lands, refunding money which the Chiefs Sacaresa and Longboard had borrowed, paying some accounts, furnishing money to purchase horses, carts, and for the expenditures of the Chiefs and their charge on the road, we have sent to be deposited in the Bank of Norfolk $2,000 for which they are to receive a check on the Bank of Columbia, which is to be delivered to the Secretary of War.

The Bonds they have placed in the hands of Mr. Slade, their attorney, for collection. The money when received to be subject to the direction of the Secretary of War.

We deem it unnecessary to make remarks on the unfairness of any of the leases or on the unjust claim set up by David Stone, esq. to a part of the undemised lands, as we expect that the validity of them will be ascertained by a judicial determination.

We are with consideration
your excellency
Humble Sire
J. Slade
William Hawkens

Governor Turner

[C O P Y]

Indian Woods
To the Chiefs of the Tuscarora Nation of Indians

Brothers:

In obedience to a wish of your representatives, Sacaresa and Longboard, I submit to you a short statement of the unfinished business of the Tuscarora Nation of Indians in North Carolina.

In the year 1748, the Legislature of North Carolina confirmed to the Tuscarora Indians the lands ceded to them by a treaty made at Contentna between the Chiefs of the Tuscarora Indians and General Moore in the year 1714, on the following condition, viz.: That if the said Indians remove off

or entirely abandon the said land it should revert to and become the property of the said State or to such persons as had before the year 1748 obtained grants for the same. And with this restriction, that they should not sell or lease any part thereof under any pretense whatsoever, and that if they should such lease, bargain or sale was declared null and void. But notwithstanding the above restriction on the 12th day of July in the year 1766, Jones, Pugh and Williams obtained their lease for 150 years, that between the 12th day of July, 1766 and the first day of December, 1777, Jones, Pugh and Williams, Thos. Pugh, Zekiah Stone, Titus Edwards, John Johnston, Thos. Kunter and John Nolaskey and William King each obtained a lease for 99 years all of which will appear by reference being had to the copies of the said leases and the map in the possession of the Chiefs Sacaresa and Longboard. That in the year 1778, the Assembly of North Carolina confirmed the 150 year lease to Jones, Pugh and Williams and also in the clause of the said act is declared as follows to wit.

And whereas the said Tuscarora Indians for good and sufficient reasons and for valuable considerations have since the 12th day of July 1766 and previous to the 1st day of December, 1777, shall not be deemed vacant lands or be liable to be entered as such in the land office unless the General Assembly shall here after so direct. And for the purpose of setting aside leases unfairly obtained the Assembly appointed William Williams, Thos. Pugh, Will. Jones, Zekiah Stone and Simon Tucker commissioners or guardians for the said Indians.

As it appeared very doubtful from circumstances which will present themselves to you on the first view of the leases and the survey whether the 99 year leases were obtained fairly, bona fide and without fraud the present commissioners advised the Chiefs Sacaresa and Longboard not to do anything directly or indirectly which could be construed an assent to the leases, for if they should by any act of theirs acknowledge the said leases it would confirm them even though they were voidable.

In consequence of said advice the Chiefs have been extremely circumspect and have refused to receive the rents in arrears and to acknowledge the rents arising from the leases supposed to have been unfairly obtained until it should be brought to recover the land or not. The commissioners jointly are authorized to compromise with the several leases if possible and extend and confirm the same and commute the Rents if they can on terms which shall be thought advisable if we do not settle. I am severally authorized as the Attorney for the Tuscarora Indians in North Carolina to collect all the information both as to matters of fact and law in my power and to forward the results of my enquiries to my Brothers, the Chiefs of the Tuscarora Nation of Indians at Niagara. If it should ultimately be concluded not to bring suits for all or for any of the said leases or if suits should be brought and recovery not affected yet you will be entitled to the rents specified in such lease or leases for 71 years and afterwards to a term of about 49 years free from any lease.

You will also observe that the Act of 1748 grants the land to the Tuscarora Indians on condition they do not remove off or entirely abandon the said land. This is remedied by the Act of 1802 only in favor of leases under Sacaresa and Longboard: now if you should forfeit your title to the undemised lands it would be contended by those who are in possession of the lands you claim that though their title was not good, you by removing off or abandoning the land have forfeited your recourse against them. It was therefore thought advisable by the Chiefs to leave one of the Nation (to wit) Jack Cain on the lands who I have promised to take care of. The Act of 1778 prohibits all persons from leasing or trespassing on the undemised lands under the penalty of $150 for every hundred acres so in proportion for as much as they shall lease, cultivate or trespass on, one half of which penalty belongs to the Tuscarora Indians. Sundry having violated the said Act, suits have been brought in the County Court of Bertie and are still depending.

With Consideration of Respect and Esteem

I am your Friend and Brother

(signed) J. Slade

Exhibit 249

National Archives, Secretary of War, Letters Sent, Indian Affairs, Volume A, pp. 368-369

Letter from Secretary of War Dearborn to J. Slade, July 2, 1803

War Department July 2d 1803

Sir,

By certain documents placed in my hands by Sacareesa and Longboard, it appears that they have constituted you, Agent and Attorney for the Tuscarora Nation of Indians, for collecting monies due them on bonds and for extending leases heretofore given of their undemised lands in the State of North Carolina.

From the extreme jealousy which the Indians entertain towards their civilised neighbors in all pecuniary transactions, it has ever been found necessary to conduct towards them with the utmost circumspection, and from their ignorance as to the modes of transacting business, it is frequently difficult to convince them of its fairness, however obvious it may appear to others better informed. These considerations induce me to suggest a wish, that you would not extend the leases of their lands without first having notified the President of the United States or myself, that you have it in contemplation. In doing this you will be pleased to state the quantity of land, the price for which it stands leased, and the price at which the lease is proposed to be extended.

Possessed of this information, it may be in the power of the Executive at all times to remove any wrong impressions, or ill founded jealousies which the Indians may receive or cherish. --

I am, etc.

TUSCARORA EXHIBIT No. 25

Opinion to Secretary of the Interior from Willis Van Devanter, Assistant Attorney-General, dated May 4, 1900.

Tuscarora Indian Reservation :
:
Lease of Lands. :

The Secretary of the Interior,

Sir:

I am in receipt, by your reference for opinion, of the papers in the matter of the proposed lease by the Tuscarora Nation of Indians of New York, to the National Contracting Company, a corporation organized under the laws of said State, of a part of the Tuscarora Reservation for the purpose of quarrying stone.

In reporting upon this matter the Commissioner of Indian Affairs, in conclusion, says:

> "In submitting this report, with return of papers, it is recommended that the Department consider the legal questions involved in the case; whether the Department can authorize the Tuscarora Indians to make a lease of their lands for quarrying purposes or whether the approval of such lease by the Department would make it valid. If these questions be answered in the affirmative the office knows of no serious objection to the approval of the lease with the National Contracting Company."

The land occupied by the Tuscaroras is a part of the territory the ownership of which was in dispute between New York and Massachusetts. This dispute was settled by an agreement made in 1786, by which New York was to have government, sovereignty, and jurisdiction over the lands in controversy, and Massachusetts was to have the right of pre-emption from the Indians. Massachusetts conveyed its title to said lands to Robert Morris in 1791, who afterwards sold to the Holland Land Company. The Tuscaroras removed from North Carolina to New York in 1722, and united with the Seneca and other nations. Subsequently they located in the neighborhood of their present reservation, and the Senecas gave them one square mile of land at that place. The Senecas in 1797, in pursuance of negotiations conducted under the sanction of the United States, conveyed to Robert Morris all their lands excepting certain specified tracts (7 Stat. 601). It is not certain that the tract occupied by the Tuscaroras was described among the excepted tracts; but however that may be, the Holland Land Company, grantee of Morris, recognized and confirmed their right thereto, and donated two more square miles adjoining thereto.

Afterwards the Tuscaroras, having sold their lands in North Carolina, purchased from the Holland Land Company 4,329 acres adjoining other lands (Report Commissioner Indian Affairs 1877, p. 167; New York Indians v. United States, 30 C. Cls. 413).

By the treaty of February 8, 1831 (7 Stat. 342), with the Menomonie Indians, the United States purchased certain lands in the Territory of Wisconsin for the New York Indians who were to be removed thereto. The intended removal was not effected, and by the treaty of January 15, 1838 (7 Stat. 550), the New York Indians ceded all of said lands to the United States, and it was agreed that a tract of land situated directly west of the State of Missouri should be set apart as a permanent home for all the New York Indians. In this treaty there were special provisions as to each of the various tribes or nations. One of the provisions as to the Tuscaroras is as follows:

> "Whereas the said nation owns, in fee simple, five thousand acres of land lying in Niagara County in the State of New York, which was conveyed to the said nation by Henry Dearborn, and they wish to sell and convey the same before they remove west: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same. . . ."

It was also recited that the Tuscaroras had conveyed to Thomas L. Ogden and Joseph Fellows all the right, title and interest in certain lands by a deed, a duplicate of which was annexed to said treaty, and provided:

> "Therefore, the United States hereby assent to the said sale and conveyance and sanction the same."

The land thus conveyed is described in the deed accompanying said treaty, as follows:

> "All that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy and not included in the land conveyed to them by Henry Dearborn."

The Tuscaroras never surrendered possession of their lands in New York, the purchase money was not paid by Ogden and Fellows, and none of the land has been sold by the United States, but the Indians have been ever since the date of said treaty, and now are, in possession and occupancy of all these lands.

It is thus seen that these Indians do not hold their lands as others do, by negotiations with the United States, but by purchase direct from private individuals, with the consent and sanction of the United States. Speaking of the treaty of 1838, the Court of Claims, in the case

of New York Indians v. The United States, supra, said:

> "In the removal of the Indians west the defendants had a political and no financial interest, for they had no property rights in the plaintiffs' New York lands and acquired none."

And again it was said:

> "The land in New York was disposed of through the States of New York and Massachusetts in negotiation with the Indians; in these transactions the United States were, in any way, only indirectly interested, and not at all financially interested. The Indian lands in New York did not come into the possession of the United States under the treaty of 1838 or otherwise, and it was never intended that they should do so."

In 1885 the Attorney-General was asked as to the authority of this Department to authorize Indians to lease their lands, and, in his opinion of July 21, 1885 (18 Op. A.G., 235), after quoting the provisions of Section 2116 Revised Statutes, as follows:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution,"

he said:

> "This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. . . ."
>
> "I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all, must rest upon some law, and therefore be derived from either a treaty or a statutory provision."

He concluded that there was no treaty provision relating to the reservations in question there that conferred such power, and that no general power had been conferred upon any officer of the government to make, authorize, or approve leases of lands held by Indian tribes. He argues that the absence of such power was one of the main considerations which led to the adoption of the act of February 19, 1875 (18 Stat. 330).

authorizing the Seneca Indians to lease lands in the Cattaraugus and Allegany reservations in New York. In this connection he said:

> "The act just cited is [illegible] showing that in the view of Congress Indian tribes cannot lease their reservations without the authority of some law of the United States."

The act of February 8, 1887 (24 Stat. 388), known as the "General Allotment Act," provided for allotments in severalty to individual members of any tribe or band of Indians "located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use." It was specifically stated that the provisions of said act should not extend to the territory occupied by certain Indians in the Indian Territory, "nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York."

The act of February 28, 1891 (26 Stat. 794), which is entitled "An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians and for other purposes,'" contains a general provision authorizing the leasing of Indian tribal lands as follows:

> "That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not reserved for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

There is no treaty provision applicable to this reservation that confers upon this Department power to authorize leases to be made, or that authorizes the Secretary of the Interior to make or approve such leases. This authority, if it exists, must rest upon the provision of the act of 1891, hereinbefore quoted. This amendatory act describes the lands to be affected in the same words as did the original act; that is, reservations created for the use of the Indians located thereon, "either by treaty stipulation or by virtue of an Act of Congress or executive order setting apart the same for their use." The exception in the original act, as to "any of the reservations of the Seneca Nation of New York Indians in the State of New York," is not affected by the amendatory act. It is clear that the provisions added by the amendatory act, including that relating to the leasing of tribal lands, were intended to apply only to such lands as came within the purview of the original act.

This reservation was not created for the Indians either by treaty stipulation or by virtue of an Act of Congress or executive order setting apart the same for their use, but was acquired by the Indians by purchase from others than the United States. It would seem, therefore, that it does not come within the purview of the act of 1891, authorizing the leasing of tribal lands. This being true, this reservation occupies now the same status, in respect to the power of this Department to authorize or approve leases thereof, as did the reservations considered by the Attorney-General in his opinion of July 21, 1885, supra.

After careful consideration of the matter, I am of opinion, and so advise you, that this Department has no authority to act upon the lease in question.

The papers submitted are herewith returned.

Very respectfully,

/s/ Willis Van Devanter

Assistant Attorney General

Approved: May 4, 1900.

E.A. Hitchcock
Secretary.

Exhibit 251

8403

TUSCARORA EXHIBIT No. 27

Letter from E.C. Finney, First Assistant Secretary, dated June 6, 1921, to Chief J. Warren Brayley, Lewiston, N.Y.

June 6, 1921

Chief J. Warren Brayley
R F D #18
Lewiston, N.Y.

Dear Mr. Brayley:

I am in receipt of your recent letter enclosing a protest signed by a number of Tuscarora Indians, against the endeavors of certain Chiefs and Carroll Brothers of Buffalo, New York, to lease Tuscarora lands containing limestone deposits.

In connection with this you are informed that complaints have recently been made relative to the activities of representatives of the Texas Producers Syndicate, which it is understood was later merged into the Canadian Oil Company, in negotiating leases with the Tuscarora Indians. The position taken was that leases executed by individual Indians occupying land as members of the tribe on the Tuscarora Reservation, in order to be valid, would have to be ratified by the council of Chiefs and also by an Act of the United States Congress.

It is suggested that you bring the matters to which you refer to the attention of the United States District Attorney for the Western District of New York #405 Federal Building, Buffalo, New York.

Respectfully,

(Sgd) E.C. Finney,

First Assistant Secretary

6-2-EMR

Exhibit 252 8404

TUSCARORA EXHIBIT NO. 25

Letter dated December 29, 1921 from Edgar H. Rickard, Sanborn, N.Y. to Hon. Charles H. Burke, Commissioner of Indian Affairs, Washington, D.C.

Sanborn, N.Y.
Dec. 29, 1921
R.F.D. 17

Hon. Charles H. Burke
Com. of Indian Affairs
Washington, D.C.

Dear Sir:

I understand that a lease can be made or the limestone can be sold on our Tuscarora Indian Res. with the approval of you and Sec. of the Interior, without the act of Congress. Am asking you this question because I am on the committee to sell the limestone deposits on our Res. And I am also secretary for the Tuscarora Indians.

Respect. your

Sec. for the Tuscarora Ind. Edgar H. Rickard
Sanborn, N.Y.
R.F.D. 17.

Exhibit 253

8405

TUSCARORA EXHIBIT NO. 29

Letter from E.B. Meritt, Assistant Commissioner, dated January 25, 1922, to Edgar H. Rickard, Sanborn, New York.

JAN 25 1922

Land, Oil & Gas
105125-21
W H F

Mr. Edgar H. Rickard
Sec'y for the Tuscarora Indians
R.F.D. 17
Sanborn, New York

My dear Mr. Rickard:

Reference is made to your letter of December 29, 1921, requesting information as to whether limestone deposits on the Tuscarora Indian Reservation can be disposed of with the approval of the Secretary of the Interior, without an act of Congress.

In reply you are advised that this matter has heretofore been considered by the Department and the position taken was that any disposition of these Indian lands and the underlying mineral deposits, in order to be valid, would have to be ratified by the council of chiefs and also by act of Congress of the United States.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner

1-FBM-23

Exhibit 254

8406
TUSCARORA EXHIBIT NO 30

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D.C.

July 9, 1958

Arthur Lazarus, Jr., Esq.
Strasser Spiegelberg, Fried & Frank
1700 K Street, N.W.
Washington 6, D.C.

Dear Mr. Lazarus:

In your letter of July 5 to the Secretary of the Interior you request a clarification of the views of this Department on the legal status of the Tuscarora Indian Reservation in Niagara County, New York.

Statements in recent correspondence from this Department to the effect that the Tuscarora lands "are under State jurisdiction" do have reference to the Act of July 2, 1948, 62 Stat. 1224, 25 U.S.C. 232, and the Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. 233, which respectively conferred criminal and civil jurisdiction on the State courts of New York in regard to Indian activities within Indian reservations located in the State. Notwithstanding the passage of this legislation we recognize that certain Federal responsibilities for Indians in New York still do exist. As recently as 1954 this Department advised the Congress that among the remaining responsibilities of the Federal Government for New York Indians, in addition to specific Federal treaty and statutory obligations for them, were "Certain other responsibilities based on general statutes of the United States applicable to all Indian tribes and the members thereof because of their status as Indians."

We regard the provision of the Act of September 13, 1950, supra, reading, "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe or band of Indians of any lands within any Indian reservation in the State of New York, as preserving the applicability of R.S. Sec. 2116, 25 U.S.C. 177 to Indian tribal lands in New York. Specifically with regard to the applicability of R.S. Sec. 2116, 25 U.S.C. 177 to the lands of the Tuscarora Reservation, on May 4, 1900, Assistant Attorney General Willis Van Devanter in response to a request for an opinion by the then Secretary of the Interior advised the Secretary that such lands were subject to the provisions of R.S. Sec. 2116, 25 U.S.C. 177 and in the absence of authority from Congress the Secretary could not approve the leasing of lands of the Tuscarora Reservation.

Sincerely yours,

/s/ Elmer F. Bennett
Solicitor

Exhibit 255

8407

83d CONGRESS
1st SESSION

H. CON. RES. 108

IN THE SENATE OF THE UNITED STATES

August 3, 1953

Ordered to be printed as passed August 1, 1953

CONCURRENT RESOLUTION

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of Congress that, upon the release of such tribes and individual members thereof from said disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

Attest:

Lyle O. Snader

Clerk of the House of Representatives.

Attest:

J. Marshall Price

Secretary of the Senate.

PETITION FOR A

WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA

FILE COPY

No. 637

Supreme Court, U.S.
FILED
MAY 11 1959
JAMES R. BROWNING, Cl

In the Supreme Court of the United States

October Term, 1958

Federal Power Commission, petitioner,

v.

Tuscarora Indian Nation et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

✓ J. LEE RANKIN,
Solicitor General,

✓ WILLIAM T. ORMSBEE,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 14, 1958, and modified on March 24, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals is unreported. It is set forth in the Appendix, *infra*, pp. 25–36. The court's order of March 24, 1959, is set forth in the Appendix, *infra*, pp. 36–37.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958, and modified on March 24, 1959 (Appendix *infra*, pp. 36–37). The jurisdiction

of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A 1950 Treaty between the United States and Canada greatly enlarged the amount of water which the United States may divert from the Niagara River above Niagara Falls for hydroelectric development. In Public Law 85–159, approved August 21, 1957, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," subject to seven specified conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act"; in the event of any conflict, the provisions of Public Law 85–159 were to govern. By order of January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for the Niagara Project, including a pump-storage reservoir of 60,000 acre-feet capacity. Approximately one-half of the pump-storage reservoir would be located on lands of the respondent Tuscarora Indian Nation.

The questions presented are:

1. Whether Congress, in specifically authorizing the Niagara Project in 1957, granted the Power Authority of the State of New York the right to take lands of the Tuscarora Indians needed for this purpose.

without regard to any otherwise applicable provisions of the Federal Power Act limiting the use of Indian lands.

2. Assuming that the general limitations of the Federal Power Act are applicable, whether the Tuscarora lands sought to be used for the pump-storage reservoir constitute a "reservation" within the meaning of Section 4(e) and Section 3(2) of the Federal Power Act, so that the Niagara Project license within such areas must be based upon a finding that it will not interfere or be inconsistent with the purpose of the reservation.

3. Whether the Court of Appeals has exceeded its power and usurped an administrative function by directing the Federal Power Commission to amend its licensing order so as to exclude Tuscarora lands, instead of remanding the case to the Commission for its consideration of any further steps required in the public interest in the light of the decision of the Court of Appeals.

STATUTES INVOLVED

The provisions of Public Law 85–159, 71 Stat. 401, approved August 21, 1957, and pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, are set forth in the Appendix, *infra*, pp. 56–62.

STATEMENT

Respondent Tuscarora Indian Nation filed a petition in the Court of Appeals for the District of Columbia Circuit, under Section 313(b) of the Federal Power Act, to review the Federal Power Commission's

order of January 30, 1958 (R. 1)[1] issuing a license to the Power Authority of the State of New York for the construction and operation of the Niagara Project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement. The Court of Appeals, after some intermediate proceedings, sustained the objections of the Tuscaroras. The pertinent facts and proceedings are as follows:

1. The power plant of the proposed Niagara Project will be the largest hydroelectric project in the United States, costing more than $700,000,000. Its planned capacity was 2,190,000 kilowatts, with an annual production of 13,000,000,000 kilowatt hours. To achieve this, the project works include a pump-storage reservoir with a capacity of approximately 60,000 acre-feet. Although the Power Authority had not been permitted to survey Indian lands, it was estimated at the time of the first hearing before the Commission on the application that the pump-storage reservoir would utilize approximately 1,000 acres of lands of the Tuscarora Indian Nation. The remainder of the reservoir would be located on lands in the Town of Lewiston. The Tuscarora Indian Nation objected to the use of any of its lands for reservoir purposes and the Town of Lewiston objected to the use of about 720 acres within the town.

The maps and drawings submitted by the Power Authority at the first hearing showed lands in addition to those owned by the Tuscarora Indian Nation.

[1] "R." refers to the printed Joint Appendix in the court below; and "T." refers to the original record filed with that court.

The Commission found that a reservoir of the proposed capacity (60,000 acre-feet) was required to utilize properly the water resources involved, but it assumed that additional lands in the area would be available for reservoir purposes in the event the Power Authority would be unable to acquire the Indian lands (R. 8). However, the location of Indian lands and their topography made them the best suited of any lands that might be available for reservoir purposes. In its order denying the application of the Tuscarora Indian Nation for rehearing, the Commission specifically found that the best location of the reservoir would require approximately 1,000 acres of land owned by the Tuscarora Indian Nation. The Tuscaroras' objections were overruled (R. 26).

2. The Commission's other relevant findings with respect to the Niagara Project are these: The Niagara River carries the surplus water of the upper Great Lakes seaward from Lake Erie to Lake Ontario. The mean flow of the river is about 200,000 cubic feet per second and because of the immense storage capacity of the upper lakes the flow is remarkably steady. While the 1909 Treaty with Canada limited diversions from the Niagara River to 36,000 cubic feet per second by Canada and 20,000 cubic feet per second by the United States, the 1950 Treaty with Canada greatly enlarged the permissible diversion. It provides for a flow over the Niagara Falls of 100,000 cubic feet per second in the daytime and early night hours during the tourist season, and 50,000 cubic feet per second at other times. The water in excess of the 1950 Treaty requirements

for flow over the Falls is divided equally between the United States and Canada for power purposes. 1 U.S.T. 694.[2]

The Niagara River drops from a mean elevation of 572 feet above sea level at Lake Erie to 246 feet at Lake Ontario. The total length of the river is 36 miles, but because of the nature of the geological formation about half of the drop of 326 feet occurs at the Falls and an additional 140 feet in the rapids immediately above and below the Falls. The "head" created by this concentration of falls and rapids in a relatively short distance, combined with the large and steady flow of the river, and its proximity to markets, makes the Niagara site one of the world's largest and most economical for hydroelectric development. Due to its high head, the water available has a potential of more than twice the power capacity of the St. Lawrence site recently developed downstream.

Practical methods for full utilization of the water available to the United States at Niagara Falls have been the subject of study for years and more especially since large additional diversions were authorized by the 1950 Treaty with Canada. Plans for the

[2] Based on a reservation in the Senate consent to ratification of the 1950 Treaty, the Commission dismissed the Power Authority's original application for a license under Section 4(e) of the Federal Power Act. The order dismissing the application was reversed and remanded by the court below. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A.D.C.). This Court vacated the judgment of the Court of Appeals as moot after enactment of Public Law 85-159. *American Public Power Assoc. et al.* v. *Power Authority of New York*, 355 U.S. 64.

essential facilities had been developed prior to June 7, 1956, when a rock slide partially destroyed the existing Schoellkopf power plant immediately below the Falls. Up until that time it had been assumed that the use of 20,000 cubic feet of water per second would continue through the Schoellkopf plant, which was operated under a Federal Power Commission license held by Niagara Mohawk Power Corporation. After the rock slide, and prior to the consideration by Congress of the special legislation in 1957, it was evident that the entire diversion permitted in the United States could and should be utilized by the project to be licensed at Lewiston. The plans underwent their last major revision after the rock slide, for the substantial quantity of water thereby made available for use through the Lewiston plant accentuated the value of a pump-storage reservoir as a means of increasing the dependable capacity of the Lewiston plant during the hours of heaviest power demand and necessitated an increase in the size of that reservoir to take advantage of the full potentialities. See also *infra*, pp. 15–17.

The superiority of the Lewiston site—proposed to be used by the New York Power Authority—is that it permits the development of the full power potential from the water available, including the development of additional head created by the rapids in the Niagara River downstream from the Schoellkopf plant. In addition, Lewiston is the only site where a pump-storage reservoir is feasible. In order to obtain a

dependable capacity of 1,800,000 kilowatts, a pump-storage reservoir of at least 60,000 acre-feet capacity is essential. The function of the pump-storage reservoir is to store water when the power load is low and to make it available for use when power is needed. Due to the Treaty requirements, the volume of water available for power generation is greater during the night than in the daytime during the tourist season. The need for power, on the other hand, is greater during the daytime than at night, and is greater during weekdays than on Saturdays and Sundays. Water not required for the power load can be stored by pumping it into a suitable reservoir during the nighttime and over the weekends. The stored water can then be withdrawn from the reservoir and used to generate power during periods of high power load. As indicated above the storage capacity required to utilize fully the water of the Niagara River permitted by international agreement was found by the Commission to be at least 60,000 acre-feet (T. 8574).[3] By utilizing all of the available water for its most beneficial purposes the cost per unit of power output is thereby reduced, per-

[3] Contrary to the impression of the court below, as expressed in its opinion of November 14, 1958 (App., *infra*., p. 29), the studies which had been reported to Congress prior to the passage of Public Law 85-159 provided for pump-storage reservoirs of various capacities. (See S. Doc. No. 113, 84th Cong., 2d Sess., p. 36; and H. Rept. No. 862, 85th Cong., 1st Sess., p. 6). However, all of the reservoirs proposed prior to June 7, 1956, were smaller than the reservoir proposed by the Power Authority after the rock slide which made the 20,000 cubic feet per second available for more complete utilization at Lewiston. See *infra*, pp. 15-17.

mitting it to be sold at the lowest rates reasonably possible in compliance with Public Law 85–159 (App., *infra*, pp. 56–60).

3. In its opinion and interim judgment entered November 14, 1958, the Court of Appeals held that Public Law 85–159 did not constitute Congressional consent or authorization for the taking of the Tuscarora Indian lands for the Niagara Project. Turning to the authority available under the Federal Power Act, the court held that these Indian lands are "reservations" of the United States within the meaning of Section 4(e) of the Federal Power Act (App., *infra*, pp. 60–61), and that the first proviso of Section 4(e) requires a finding by the Commission that the license will not interfere or be inconsistent with the purposes for which the Tuscarora Indian Reservation was created or acquired, as a prerequisite to the validity of a license authorizing their condemnation. The court remanded the case to the Commission to explore the possibility of making that finding, expressly retaining jurisdiction and requiring that the Commission report to the court its action pursuant to the remand.

4. The Commission held extensive hearings pursuant to the remand, exploring not only the possibility of making the required finding but also the possibility of removing the pump-storage reservoir from Indian lands. On February 2, 1959 (App., *infra*, pp. 38–48), the Commission found that the license, insofar as it includes lands of the Tuscarora Indian Nation, will interfere and be inconsistent with the purpose for which the Tuscarora reservation was created or ac-

quired. But it also found from the whole record that a pump-storage reservoir with a usable storage capacity of 60,000 acre-feet is essential to the utilization of the United States share of the water resources, as required by Public Law 85–159. The Commission pointed out that severe community disruption, unreasonable expense, and substantial delay would be caused by the flooding of part of the Town of Lewiston and, absent any feasible alternative, declared that removal of the reservoir from Indian lands would reduce storage capacity to 30,000 acre-feet, and result in a loss of one-sixth the dependable kilowatt capacity of the Project (T. 8574, App., *Infra*, pp. 39–40).

5. The Commission's findings of February 2, and its order of February 25, 1959 (App., *infra*, pp. 49–56), denying the application of the Power Authority for rehearing, were transmitted to the Court of Appeals. Upon various motions of the parties, the court entered its final order and judgment on March 24, 1959, approving the license except in so far as it would authorize the condemnation of Tuscarora lands for reservoir purposes, and remanding the case to the Commission with instructions to amend the licensing order so as to exclude specifically any such condemnation power (App., *infra*, pp. 36–37).

REASONS FOR GRANTING THE WRIT

This is a case of substantial national importance. The decision below, if unreversed, will undoubtedly compel a drastic reduction in the dependable capacity of the vast Niagara hydroelectric project, which will be the largest in the country. This result will

frustrate Congress' direction to utilize all of the United States share of the Niagara River water acquired by international agreement with Canada, and will thwart the full development of a vital national resource, upon which a great industrial area depends. This is so because the plain fact is that lands of the respondent Indian Nation are necessary for the project as contemplated by the Power Authority and licensed by the Commission, and it now appears clear that those lands cannot reasonably be acquired except through condemnation.

In its interim decision, the Court of Appeals stated that the Indian lands were not necessary and that, with some additional expense, the same size reservoir could be located elsewhere (App., *infra*, p. 35). But the Commission, upon remand, found that higher dikes alone were not feasible and that the alternative flooding of the Lewiston town site could not be approved. It anticipated that a removal of the reservoir from Indian lands, cutting down its area, would reduce the dependable capacity of the project by one-sixth, a loss of 300,000 kilowatts of capacity. While the New York Power Authority has since applied to amend its license, redesign the reservoir, and avoid part of this loss,[4] a serious detriment is unavoidable.

[4] The Power Authority's application was filed March 2, 1959, and has not yet been acted upon by the Commission. It proposes changes which would result in a pump-storage reservoir with a 45,000 acre-feet capacity. The license calls for 60,000 acre-feet while the elimination of Indian lands without the proposed changes would reduce the reservoir size to 30,000 acre-feet.

The Court of Appeals reached its result on the theory that the lands owned by the Tuscarora Nation could not be utilized without fulfilling the requirements governing the taking of a "reservation" under Section 4(e) of the Federal Power Act. We submit that Public Law 85–159, specifically authorizing the Niagara Project, superseded any limitations in the Power Act which conflict with the direction to utilize all the available water for power purposes, and that Congress has necessarily authorized the taking of these lands by eminent domain. On this point, the decision below is in direct conflict with the views of the Second Circuit, expressed in a suit dealing with condemnation of the Tuscarora lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U.S. 841.

Furthermore, even if the Section 4(e) limitation were applicable to the Niagara Project, we submit that lands owned in fee by an Indian Nation do not constitute a "reservation" under the special meaning of that term in the Federal Power Act and, hence, may be condemned like ordinary private lands, under Section 21 of that Act.

I

1. The judgment of the court below would preclude the Commission from issuing a license to the New York Power Authority for the construction and operation of the complete comprehensive project expressly authorized and directed by Public Law 85–159 (App., *infra*, pp. 56–60). As the Second Circuit observed, the direction to the Commission "was specific

namely, 'to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement.'" *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 894, certiorari denied, 358 U.S. 841. On this issue the Second Circuit's ruling is in direct conflict with the holding below.

Contrary to the opinion below (App., *infra*, pp. 29–30), Congress did not merely specify some details of the Niagara Project, leaving the remainder to the ordinary criteria. Adopted after hearings which set forth the proposed plans, Public Law 85–159 named the licensee and set forth the objective of full utilization, *i.e.*, the development of the full power potential of the river waters available to the United States. Cf. H. Rept. No. 862, 85th Cong., 1st Sess., pp. 6–7; and S. Rept. No. 539, 85th Cong., 1st Sess., pp. 5–6. It also established the superiority of these provisions (and others) over any inconsistent terms of the Federal Power Act. Section 2 of Public Law 85–159 (App., *infra*, pp. 59–60) states that the Commission is instructed to follow its regular procedures in issuing the license but that "in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." Cf. H. Rept. No. 862, 85th Cong., 1st Sess., p. 11.

Moreover, Section 1(b) of Public Law 85–159 (App., *infra*, p. 56) makes applicable to the license for the Niagara Project seven specified "licensing conditions, in addition to those deemed necessary and re-

quired under the terms of the Federal Power Act * * *." The licensing "conditions" of the Federal Power Act are set forth in its Section 10, 16 U.S.C. 803 (App., *infra*, pp. 61–62); consequently, the only conditions under the Federal Power Act which may be deemed necessary and required for the Niagara Project are those applicable under Section 10, and not inconsistent with Public Law 85–159. But the limitation on the utilization of land in a "reservation" is contained in Section 4(e) of the Federal Power Act, not Section 10, and even if otherwise applicable, was necessarily superseded by Public Law 85–159.

Section 4(e) requires that licenses for projects within a "reservation" shall be issued only after a finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *". But where Section 4(e) applies, the Commission has authority not only to issue a license but to refuse to issue it if the necessary finding cannot be made. Here, however, authority to refuse the Power Authority's license, or to limit it to partial utilization of the Niagara River waters, was withdrawn by Congress when it enacted Public Law 85–159. There was no more authority reserved to the Commission to determine that the designated project would interfere with a reservation than for the Commission to determine that only part of the available water should be utilized, or that the pump-storage reservoir should be eliminated altogether, or that the license should be issued to another applicant.

In short, under the terms of Public Law 85–159, the Power Act's Section 4(e) finding, required by the court

below, cannot stand as a bar to the licensing and construction of the comprehensive water-power development specifically directed by Congress in 1957.

2. To support its view of the Congressional purpose in Public Law 85–159, the Court of Appeals indicated that no storage reservoir was discussed before passage of the bill (App., *infra*, p. 29). This is erroneous. The Second Circuit has pointed out that the plans presented to Congress included a pump-storage reservoir. *Tuscarora Nation of Indians* v. *Power Authority*, *supra*, 257 F. 2d at pp. 893–894. This was true even before the Schoellkopf plant was destroyed (*supra*, pp. 6–9 and fn. 3); thereafter, the importance of the reservoir was greatly enhanced, since an additional flow of 20,000 cubic feet of water per second could be added to the new Niagara Project.

Immediately after the Schoellkopf destruction, a hearing was held on June 28, 1956, by the House Committee on Public Works on the Niagara redevelopment bills, S. 1823 and H.R. 11477, 84th Cong., 2d Sess., and the Power Authority made further engineering studies on utilization of the entire diversion. An outline of the revised plan showing the general location of the principal project works, including an enlarged pump-storage reservoir, was given in the 26th Annual Report of the Power Authority, dated January 28, 1957. In addition to showing the general location of the proposed enlarged project works, this report (pp. 12–13, 38–43; T. 7897–7898, 7923–7928) gave a brief description of the proposed project, including the installed capacity of 2,190,000 kilowatts with a dependable capacity (firm power output) of 1,800,000

kilowatts (T. 7923) which could only be achieved through the use of the pump-storage reservoir. This is the report and the revised plan which was approved by the Senate and House Committees reporting the Niagara redevelopment bill which became Public Law 85–159 on August 21, 1957.[5] The maps showing the location of the reservoir included lands here in suit, owned by the Tuscarora Nation.[6]

[5] The Niagara redevelopment bill was reported out June 27, 1957 by the Senate Committee on Public Works (S. Rept. No. 539, 85th Cong. 1st Sess.) with this statement (p. 6):

> There is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by the Corps of Engineers, the Bureau of Power of the Federal Power Commission, the Niagara Mohawk Power Corporation, and the Power Authority of the State of New York. *The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station.* [Emphasis added.]

The full capacity proposed by the Power Authority was accepted by the House Committee on Public Works in its report of July 23, 1957 (H. Rept. No. 862, 85th Cong. 1st Sess., p. 7):

> As a result of the disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required. * * *

[6] On the papers before Congress, there was no indication of the ownership of the project lands, except that it was noted that part of the lands were owned by Niagara Mohawk Power Corporation, which had operated the Schoellkopf Plant. No representations had been then made by the Indians and there was no reason to believe that any problem would arise with respect to the condemnation of the lands.

Referring to the legislative background, the Second Circuit held that Congress in Public Law 85–159 impliedly authorized the taking of the Tuscarora lands. Because of the size and extent of the project, the contemplated necessity for a pump-storage reservoir, and the proximity of the Indian lands, the likelihood that these lands would be taken was found within the Congressional knowledge and intent. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at pp. 893–894. We submit that this ruling was sound and that the court below erroneously found no such consent or authorization by Congress.

3. Public Law 85–159, therefore, precluded any application of Section 4(e) of the Power Act to the Indian lands required by the Niagara Project. In addition, Public Law 85–159 constituted the federal approval needed for alienation of Indian lands. Congress can take such lands by eminent domain and it may do so by its authorization of projects extending to those lands, even without specifically designating Indian lands as its object. *Henkel* v. *United States*, 237 U.S. 43; *Spalding* v. *Chandler*, 160 U.S. 394; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Seneca Nation* v. *Brucker*, 262 F. 2d 27 (C.A.D.C.) pending on petition for writ of certiorari, No. 860, this Term; *United States* v. *21,250 Acres of Land*, 161 F. Supp. 376 (W.D.N.Y.); *United States* v. *5,677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.). See Brief for the Respondents in Opposition, *Seneca Nation* v. *Brucker*, No. 860, this Term, at pp. 5–6. The wisdom of Congress in determining the use of the water resources here involved

is not subject to review (*Oklahoma* v. *Atkinson Co.*, 313 U.S. 508); nor is the Commission's determination as to the necessity for a pump-storage reservoir located, in part, upon Tuscarora lands (*Chapman* v. *Federal Power Commission*, 345 U.S. 153, 171).

II

Even if Section 4(e) of the Power Act (App., *infra*, pp. 60–61) is fully applicable to the Niagara Project, it does not protect the Indian lands here involved. The Second Circuit briefly set out the history of the Tuscarora Nation, and pointed out that the tract sought for the reservoir is owned by the tribe in fee and was purchased by it from the Holland Land Company in 1804, title being finally taken in 1809. *Tuscarora Nation of Indians* v. *Power Authority, supra*, 257 F. 2d at 887. While the manner of acquisition and holding may not be pertinent to the statutes restricting alienation of Indian lands, as the Court of Appeals stated (App., *infra*, pp. 26–27), an entirely different question is presented here—whether these lands constitute a "reservation" under the special provisions of Section 4(e) of the Power Act. We submit that the term "reservation" in that Act comprehends only lands owned in fee by the United States, or in which the United States has a real property interest, and, therefore protects only Indian tribal lands held in trust by the United States or in which the United States has some property interest.[7]

In the first place, Section 4(e) refers to "the public lands and reservations *of the United States*" (empha-

[7] The majority of Indian lands in the United States consist of government lands held in trust for the Indians under treaty and statutory provisions.

sis added), and thus limits the term "reservation", for Power Act purposes, to those reservations which may properly be deemed to belong to the United States. Secondly, there is a special definition of "reservation" in the Power Act which carries the same connotation. Section 3(2) provides:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks:[8] [Emphasis added.].

Under this definition, to constitute a "reservation" the lands must be "owned by the United States" and dedicated to certain uses, either as national forests, military reservations, or as an Indian reservation, in which tribal lands are protected.

Our view that federal ownership is fundamental is also shown by other provisions of the Power Act. The Act contemplates that *private* lands will be taken by eminent domain under Section 21. However, federal lands including Indian "reservations" are not to be condemned. Rather, under Section 10(e), the licensee pays an annual rent charge to the United States.[9]

[8] Section 3(1) defines "public lands" as "such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;".

[9] Where the reservation involved is an Indian reservation, Section 10(e) makes the amount of the charge subject to the approval of the Indian tribe, but the payment is still made to

The distinction rests on the fact that, since the "reservation" is already government-owned land, no condemnation is necessary to obtain title and make it available for hydroelectric development. On the contrary, in the instant case it has been recognized from the outset that the taking of an interest in the Tuscarora lands by eminent domain will be required in order to proceed with the project.[28] This acceptance by all parties of the propriety and need for condemnation is based upon the fact that the lands are owned in fee, and an annual charge under Section 10(e) would be entirely inappropriate. By the same token, the lands are not a "reservation," for Power Act purposes, requiring special treatment under Section 4(e).

The term "reservation" is likewise used by the Power Act, in describing the jurisdictional bases for the issuance of licenses, so as to indicate that federally-owned lands alone are meant. Section 4(e) opens with the general authorization to license hydroelectric and other facilities "in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and *reservations of the United States* (including the Territories), or for the

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the United States, in trust, because the Section deals with federal lands in trust.

The approval of the Indian tribe need be had under Section 10(e) only if the tribe has organized as permitted by Section 16 of the Act of June 18, 1934, 25 U.S.C. 476. The Tuscarora Nation has not so organized (T. 8201).

[28] The interest taken should be that interest best adapted to both the execution of the project and the protection of the rights of the Indians.

purpose of utilizing the surplus water or water power from any Government dam * * *" (Emphasis added.) This Court pointed out in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, that the Act's licensing power "in relation to public lands and *reservations of the United States* springs from the Property Clause" of the Constitution—Article IV, Section 3. (Emphasis added.) The Court thus demonstrated its understanding that lands, to qualify as a "reservation" under the Power Act, must constitute federal property. Any dealings with Indian lands such as the Tuscarora property here involved would necessarily have been based upon the power to regulate commerce, including commerce with Indians, rather than upon the property clause of the Constitution.

This conclusion was further spelled out in *Federal Power Commission* v. *Oregon, supra,* when the Court referred to the difference in "established meaning" of the terms "public lands" and "reservations". The former were federal lands subject to appropriation and disposal under the public land laws; the latter were not so subject. In other words, a "reservation" consists of federal lands of a certain type, dedicated to a certain purpose. 349 U.S. at 443–444. The Federal Government's guardianship interest in the Tuscarora Indians, and restrictions upon alienation arising from federal law, do not constitute an interest of the United States in the tribe's lands sufficient to make them public or publicly-owned lands for the purposes of the Power Act. The Tuscarora lands cannot, therefore, constitute a "reservation" within the special meaning of the Power Act.

Finally, the interest of federal guardianship over Indians does not require the application of Section 4(e) to such property of an Indian tribe. The protection against improvident alienation remains in the requirement of federal approval; this approval is here contained in Public Law 85-159 and in Section 21 of the Power Act, authorizing the taking of lands needed for a federal power project. Where the United States or a federal licensee acquires the property, just compensation is assured by the provisions of the Fifth Amendment and also by Section 21, which expressly provides for condemnation proceedings by a licensee to acquire non-federal lands necessary for an authorized project. This is the measure of guardianship protection given under Section 21 by the Second Circuit in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, certiorari denied, 358 U.S. 841. To extend the interpretation of the term "reservations" in Section 4(e) of the Power Act is not justified by the other provisions of that statute.

III

As we have shown, the Court of Appeals erroneously invalidated the license issued to the Power Authority to the extent that the license authorized the condemnation of the lands of the Tuscarora Indians. This error was compounded when the court remanded the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn

the said lands of the Tuscarora Indians for reservoir purposes" (App., *infra*, p. 37).

As this Court held in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21, the power of the Court of Appeals "to affirm, modify, or set aside" a Commission order "in whole or in part" does not authorize it to exercise "an essentially administrative function". Its function ends when an error of law is laid bare; the matter must then be returned to the agency for reconsideration.[10]

The order below compels the implementation of a modified license. But under established law it is up to the Commission to determine whether, and to what extent, the project should proceed if Indian lands may not be taken. It must weigh the consequent loss of kilowatt capacity against the Congressional injunction to use the full power potential of the Niagara River waters. It must, under Section 10(a) of the Power Act, decide whether a project with a smaller reservoir is still "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *". This is "an administrative, not a judicial, decision." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. at 21. Even if the deci-

[10] Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618–619; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

sion below is correct, the court should have gone no further than to remand the case to the Commission for its further consideration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY, 1959

APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 14475

TUSCARORA INDIAN NATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENOR

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Decided November 14, 1958

Mr. Arthur Lazarus, Jr., with whom *Mr. Eugene Grossman* was on the brief, for petitioner.

Mr. John C. Mason, Deputy General Counsel, Federal Power Commission with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Mr. Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, also entered an appearance for respondent.

Mr. Thomas F. Moore, Jr., with whom *Mr. Frederic P. Lee* was on the brief, for intervenor.

Before PRETTYMAN, *Chief Judge*, and EDGERTON and DANAHER, *Circuit Judges*

PRETTYMAN, *Chief Judge*: The issue here is whether the New York Power Authority has a valid license

from the Federal Power Commission to build a dam that will flood certain lands of the Tuscarora Indians. We are of opinion that the case must be remanded to the Federal Power Commission for further consideration. In order that the litigation may not be delayed more than is necessary, we shall state in this memorandum the propositions which lead to our conclusion, without taking the time to complete an opinion in the customary form.

I

The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides "No purchase, grant, lease, or other conveyance of lands * * * from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." [Emphasis added.] The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York." The United States Court of Appeals for the Second Circuit held that the lands involved here are protected by that provision.[3] It makes no difference how

[1] Rev. Stat. § 2116 (1875), 25 U.S.C.A. § 177.

[2] 64 Stat. 845, 25 U.S.C.A. § 233.

[3] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885.

title to the land may have been acquired by the tribe.[9]

The statement in the letter of the Assistant Secretary of the Interior, referred to in the Commission's order denying rehearing, that these reservation lands are under state jurisdiction, is patently in error insofar as alienation is concerned.

To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner.

II

We have jurisdiction. The Federal Power Commission issued the license for this project (Project No. 2216, Niagara Project) by an order dated January 30, 1958. It did not in that order designate the land upon which the reservoir here involved should be located.[10] In an order dated May 5, 1958, the Commission approved for inclusion in the license a map showing the location of the project works authorized by the license. The Tuscarora Nation petitioned for

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[9] See *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938); COHEN, FEDERAL INDIAN LAW 321 (4th ed. 1945); 18 OPS. Att'y Gen. 235 (1885). And also see *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[10] The Commission knew in January of the opposition of the Tuscaroras. The January 30th order recited: "The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are availbale for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

review of the January order. It did not separately or specifically petition for review of the May order. The Power Authority argues that the only order as to which the Tuscaroras are aggrieved is the May order and that we have no jurisdiction over that order because no appeal was taken from it. We treat the May order as the Commission treated it, *i.e.*, that the map which it approved became a part of the license for the project, which license was issued by the January order. As a matter of fact, some time prior to April 18, 1958, the State of New York, on behalf of the Power Authority, for purposes of condemnation filed with the County Court of Niagara County a map and a description of the project as to which it claimed to be a licensee of the Federal Power Commission, and that map included these Tuscarora lands. The January order of the Commission and all its parts are before us on this petition for review.

III

The Commission was expressly directed by the Congress to issue a license to the Power Authority of New York for the construction of a power project with capacity to utilize all of the United States share of the water of the Niagara River.[5] That statute provided, *inter alia:* "The Federal Power Commission shall include among the licensing conditions, *in addition to those deemed necessary and required under the terms of the Federal Power Act,* the following: [describing seven conditions]." [Emphasis supplied.] Thus the special statute required the Commission to include in the license all those conditions required by the Federal Power Act. The statute (Sec. 2) also required that the rules of practice and

[5] Act of Aug. 21, 1957, 71 STAT. 401.

procedure of the Commission should apply to the granting of the license.

Moreover the record is quite clear that Congress was not advised of the possibility that Indian reservation lands might be sought as the site of part of the project.[6] The Committee reports make no mention of the location of the project works, except, of course, that they would be in this area. During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company. Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: "No dams or provisions for storage of water are necessary."[7] This testimony related to the project as planned prior to the Schoellkopf disaster, but we are not advised that the impression given was ever withdrawn or changed.

Congress did not by the special statute of 1957 license the Power Authority for this project. It directed the Commission to issue the license. It did not specify the works (dams, reservoirs, etc.) of which the project was to consist or the property upon which the project works were to be located. It left all those matters to the Commission. It did not specify all the licensing conditions; it specified some and left the others to the Commission. It contemplated, and explicitly said, that there would be a proceeding before the Commission in the process of granting the license. We think Congress clearly meant that the license should be issued under the Federal Power Act and according to the terms of that Act; save only that

[6] 103 Cong. Rec. 13194–211, 13364–5, 14437–56 (1957); H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957); S. Rep. No. 539, 85 Cong., 1st Sess. (1957).

[7] 103 Cong. Rec. 14438 (1957).

Congress itself named the licensee, described the scope of the license, and specified seven conditions to be included in the license by the issuing Commission.

As a matter of fact the Federal Power Commission did not understand when it issued its license order of January 30, 1958, that the taking of these reservation lands was necessary for the project or that it was authorizing the taking of such lands. In its order the Commission referred to the objection of the Tuscaroras to the use of their land for reservoir purposes and said: "However, we do not attempt to pass on the question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

We conclude on this point that Congress did not in the special statute consent to or authorize the taking of this Indian land for this project.

We have given careful consideration to the possibility that Congress, in adopting the 1957 legislation, was exercising for the United States the totality of its sovereign capacity in respect to this resource, and that the exercise of this power by Congress might be said to be without limitations. This might be in furtherance of a policy of Congress so to govern disposal of rights to develop hydroelectric power that the development would be in the manner the Congress, not an administrative agency or the courts, might select.* Accordingly it might be argued that Congress in the 1957 Act made provision, by a single stroke, for the immediate development by the Power Authority of one of the nation's greatest resources, with all the concomitant factors of necessary works, seizure of prop-

*See *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940). Compare *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250 (1954).

erty, and conditions of operation. Of course, had the Federal Government chosen to develop the power through its own plant, it could have done so without the slightest reference to the Power Authority. And, it may be argued, accordingly it did precisely that and the Authority is an agent of the United States as well as of the State of New York. Under that view there need be no reference to Part I of the Federal Power Act and hence none to Section 4(e), much less to Section 3(2). Part I of that Act, in short, might be said to have applicability only in the event that an application by an entity essentially private in origin was made for a license in accordance with the terms of the Act. If Congress, on the other hand, wished to speak directly in the premises—and in behalf of the United States—it was free to do so in complete disregard of limitations to be found in the Act which would apply in the case of others. Such a course, had Congress adopted it, would have the advantage of short-circuiting restrictions and conditions to be found in the Power Act, to the end that the Power Authority might immediately get on with the business.

We have considered that approach, but even as we have considered it we must reject it for we find no escape from the language of the 1957 Act. As we have already pointed out, Congress did not issue a license, it authorized and directed its established agency to issue the license, and the Commission was ordered to include not only specified conditions but also "those * * * required under the terms of the Federal Power Act". Inevitably, therefore, we are bound to revert to the Commission's January order and its order denying the Tuscarora petition for rehearing, pursuant to which the license was to issue. Accordingly, we turn specifically to consideration of

the controlling aspect of the questions before us, namely, whether or not the license might be issued without a Section 4(e) finding. The answer to that question depends in turn upon the meaning of Section 3(2).

IV

The Federal Power Act defines certain words for the purposes of the Act. It provides:[9]

> "[R]eservations" means national forests, *tribal lands embraced within Indian reservations,* military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks. [Emphasis supplied.]

It further provides[10] in pertinent part that "That Commission is * * * empowered * * * [t]o issue licenses * * * for the purpose of constructing * * * reservoirs * * * upon * * * reservations of the United States". Then follows a proviso:

> *Provided,* That licenses shall be issued *within any reservation only after a finding* by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. [Emphasis ours.]

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[9] Sec. 3(2), 41 STAT. 1063 (1920), as amended, 49 STAT. 838 (1935), 16 U.S.C.A. § 796(2).

[10] Sec. 4(e), 41 STAT. 1065 (1920), as amended, 49 STAT. 840 (1935), 16 U.S.C.A. § 797(e).

The land here in dispute is indubitably "tribal lands embraced within Indian reservations" within the usual meaning of that phrase. But it is argued by the Commission and the Power Authority that the term "reservations" as used in this statute does not include all tribal lands embraced within Indian reservations but only those tribal lands in which the United States owns an interest and which had been withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws. The argument is based upon a construction of the definition in Section 3(2) of the Act. That construction would be that the phrase "owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" describes all the opening terms in the paragraph—*i.e.*, national forests, tribal lands embraced within Indian reservations, and military reservations. The Commission and the Power Authority say that the United States has and has had no interest in these lands. They point to the fact that this land was acquired by the Tuscaroras by purchase in fee simple with money obtained by them from the sale of land in North Carolina. We think that this reservation is one in which the United States has an interest, and the result here reached must be the same as if the phrase "owned by the United States, [etc.]" were not construed as a limitation upon the terms "tribal lands [etc.]." The money derived from the sale in North Carolina was handled by the United States on behalf of the Indians and was applied by the United States to the acquisition of this land, which adjoined the reservation already owned and occupied by the tribe. We are not alone in concluding that the Tuscaroras' reservation clearly is entitled to the protections accorded without distinction

to Indian tribal lands elsewhere. In *United States* v. *7,405.3 Acres of Land*[11] Judge Parker laid down the doctrine that the guardianship of the United States over the Indians, which includes protection of the Indians from improper alienation of their lands, constitutes sufficient interest in those lands to require congressional expression of the consent of the United States to such alienation. We concur in that view.[12] Whether under the Constitution's "Property" clause, obviously applicable to Government lands, concededly within Section 4(e) of the Act, or under the "Commerce" clause, predicating Section 21 of the Act,[13] the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here.

The argument of the Federal Power Commission and the Power Authority is that the Power Act allows the Commission to deal with federal land (except national forests and monuments) after a Section 4(e) finding. In that section Congress was exercising its constitutional right to dispose of property held by the United States. By Section 21 of the Act, says the Commission Congress, acting under the interstate and foreign commerce clause, allowed the Commission to act in regard to non-federal land. Generally speaking, we agree with the Commission up to this point.

But the application of Section 21 to land held in fee simple by Indian tribes presents a special problem, even if such land be deemed to be non-federal land. Dealings with the Indians are within a special clause

[11] 97 F. 2d 417 (4th Cir. 1938).

[12] We need not go into the complicated ramifications of the nature of Indian reservations depending upon the process of their creation. See, e.g., *United States* v. *Tillamooks*, 329 U.S. 40 (1946); *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

[13] 41 STAT. 1074 (1920). 16 U.S.C.A. § 814.

of the Constitution, conferring power on the Congress to regulate commerce with the Indian tribes. The relationship between the United States and members of Indian tribes resembles that of guardian and ward. Alienation of Indian lands, a prerogative of the United States as guardian, requires congressional consent. We do not find congressional consent in the 1957 statute or in any other statute except the Federal Power Act. We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with "public lands and reservations" as defined in Section 3(2), Congress was exercising not only its power under the property clause of the Constitution but also its power to regulate commerce with the Indian tribes and, therefore, to allow alienation of the land here involved.

V

On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope. The acquisition is desirable solely from the standpoint of economy, apparently acquisition and construction costs would be lower here than at any other place in the area. We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation.

VI

We have authority to remand to the Commission for further findings.[14]

[14] *Ford Motor Co.*, v. *Labor Board*, 305 U.S. 364 (1939); *Fleming* v. *Federal Communications Comm'n*, 96 U.S. App. D.C. 223, 225 F. 2d 523 (D.C. Cir. 1955).

VII

We are of opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding. If the Commission concludes that the finding can be made and makes it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand. In order that the litigation may not be prolonged unduly, our remand order will require that the Commission report to us within fifteen days hereafter regarding its action pursuant to the remand.

So ordered.

ORDER

(MARCH 24, 1959)

Before PRETTYMAN, *Chief Judge*, EDGERTON *and* DANAHER, *Circuit Judges, in Chambers*

WHEREAS we held in our opinion filed herein November 14, 1958, that the finding required by Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e), is necessary to the validity of a license purporting to authorize the condemnation of Tuscarora Indian tribal lands, and remanded this case to the Federal Power Commission for further proceedings:

AND WHEREAS on February 2, 1959, after extensive hearings, the Commission, in an opinion and finding, reported to this court that under the facts presented it could not make the finding required:

AND WHEREAS the petitioner subsequently moved for final determination of issues, the respondent moved for reconsideration and for final determination of issues, the intervener moved for renewal of its petition for reconsideration of interlocutory holdings, and the United States, having been admitted as *amicus curiae*, moved for reconsideration and for oral argument, and the court having duly considered the foregoing motions and report of the Commission;

NOW, THEREFORE, IT IS ORDERED by the court that the license issued by the Commission to the Power Authority of the State of New York for the Niagara River Project is approved except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes, and further ordered that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes.

Per Curiam.

Dated: March 24, 1959.

United States of America

Federal Power Commission

Before Commissioners Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

Project No. 2216

IN THE MATTER OF POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317

Opinion and Finding

(Issued February 2, 1959)

We have given further consideration to the license order issued on January 30, 1958 (19 F.P.C. 186) to the Power Authority of the State of New York for the Niagara Falls Project No. 2216 under the Federal Power Act and Public Law 85–159 approved August 21, 1957 (71 Stat. 401) and to the order of March 21, 1958 (19 F.P.C. 362) denying rehearing.

On November 14, 1958, the United States Court of Appeals for the District of Columbia Circuit, in *Tuscarora Indian Nation* v. *F.P.C.* (No. 14475) in a memorandum opinion, remanded the order of January 30, 1958 to the Commission for consideration of a possible finding under Section 4(e) of the Federal Power Act that the license for the Niagara Falls Project will not interfere or be inconsistent with the purpose for which the Tuscarora Indian reservation was acquired. The court allowed fifteen days within which we were to report. This time has been extended by the court, upon our request, so that we might hold hearings and consider the new evidence presented. The hearing commenced on November 24, 1958. The parties con-

curred in omission of the intermediate decision procedure. Proposed findings and conclusions were filed by the parties on December 19, 1958, and we heard oral argument on January 2, 1959.

At the conclusion of the hearings, the Tuscarora Indian Nation and the Power Authority entered into negotiations seeking a settlement of their differences. Although these negotiations were carried on in good faith by both parties they were not successful, and we accordingly are immediately acting, upon being advised by them that further negotiations were impractical.

Since the opinion of the court is not final, we believe it is desirable also briefly to discuss and make findings with respect to other evidence admitted by the examiner.

In our order of January 30, 1958 issuing license after the conclusion of the first hearing, we found that it would be infeasible to reduce the area of the proposed storage by about 720 acres as proposed by the Town of Lewiston and that a pumped-storage reservoir with a usable storage capacity of 60,000 acre-feet and utilizing about 25 feet of drawdown would be required to properly utilize the water resources involved. Although maps and drawings presented at the first hearing showed that it would be physically possible to relocate the pumped-storage reservoir so as to eliminate the Indian lands, and the New York Power Authority so contended, the location of Indian lands and their topography made them the best suited of any lands that might be available for reservoir purposes for the Niagara project.

The record shows, and we now find, that the use of other lands in lieu of Indian lands for pumped-storage reservoir purposes would cause a substantial

delay in construction; would result in severe community disruption; would separate parts of the Town of Lewiston by a large body of water which could not be bridged; would call for the rerouting at unreasonable expense of main highway and railroad tracks, and disrupt school transportation, sewage, domestic water supply, fire protection and civil defense activities; would require the removal of approximately 450 homes and two cemeteries and call for the destruction of a new school costing over a million dollars.

We also find from the whole record that a pumped-storage reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States' share of the water of the Niagara River made available by international agreement, a requirement expressly imposed by Congress in the Act of August 21, 1957, Public Law 85–159. A pumped-storage reservoir of smaller area with usable storage capacity of 60,000 acre-feet utilizing higher dikes and a drawdown of more than about 25 feet is technically infeasible and is economically undesirable. The removal of the pumped-storage reservoir from Indian lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet resulting in a loss of about 300,000 kilowatts of dependable or a reduction of about one-sixth of the total dependable capacity of the Niagara Project.

Since the Court of Appeals for the District of Columbia has found our conclusion that there was no necessity for a finding under Section 4(e) to be erroneous, we now proceed to the task assigned us by the court.

We find that the Tuscarora Indian Nation comprises 6,249 acres of land and is situated in the County of Niagara in the State of New York and that the

Tuscarora Nation of Indians has continuously resided on the reservation for more than 150 years. The Power Authority of the State of New York seeks to acquire 1,383 acres of land within the reservation for use as a reservoir site. This land and other land contiguous to it were acquired by the Tuscarora for a homeland and a place to live and for farming and related uses. The Tuscarora had left North Carolina and gone to this land in the State of New York.

There are more than 600 Indians presently residing on the reservation and there are 37 homes which are occupied by more than 175 persons within the proposed reservoir site. The construction of the proposed reservoir would inundate or make unusable approximately 22 percent of the entire Tuscarora reservation. In our opinion the fact that the Indians who would be displaced could find room on other parts of the reservation is immaterial because it is entirely possible that the number of Tuscarora desiring to use reservation lands will increase in the future.

The possibility that the displaced Tuscarora could relocate on other lands now not a part of, but contiguous to the reservation is immaterial. Such an arrangement would seem to provide an equitable solution to the problem, but would not alter the fact that the taking of the 1,383 acres of Tuscarora lands would interfere and would be inconsistent with the purpose for which the reservation was created or acquired.

We, therefore, find that the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired.

We realize that this finding will result in a higher cost for the electricity to be generated by this project,

and that in the event it is not economically feasible to substitute other lands as a reservoir site, will result in a plan not best adapted to the comprehensive development of the Niagara River for power and other purposes. Accordingly, we regret that we have not been able to reach any other solution. However, we cannot permit our judgment to be swayed by our personal views of what is desirable but must administer the laws as passed by the Congress and as interpreted by the courts. No other finding may be reached by us under the evidence.

Since this is a final order insofar as this Commission is concerned, the parties have a right to petition for rehearing under the provisions of Section 313(b) of the Federal Power Act in the event they disagree with our conclusions and wish to appeal therefrom, and for this reason we are at this time certifying to the court only a copy of this opinion and finding and are retaining the record made at the hearings.

By the Commission. Commissioners Stueck and Connole dissenting.

/s/ J. H. Gutride,
JOSEPH H. GUTRIDE,
Secretary.

CONNOLE and STUECK, Commissioners, *dissenting:*

We have been asked by the United States Court of Appeals for the District of Columbia to explore the possibility of making a finding that the storage reservoir of the Niagara River Power Project can be constructed on the tribal lands embraced with the Tuscarora Reservation without interfering or being inconsistent with the purpose for which that Reservation was created or acquired. Majority have completed their exploration and return to the Bench with empty hands. The expedition into the legal jungle has been fruitless.

As a result a seven hundred million dollar project,[1] financed by lending institutions, insurance companies and the savings of private citizens, through bond issues, hangs as near the edge of disaster today as did the ill-fated Shoellkopf plant on June 7, 1956, just before it crashed to destruction in the Niagara Gorge. That disaster gave such urgency to this project that every partisan and selfish interest but one was forgotten in the pressing need for power. Yet, because one interest persists, "the largest hydro-electric project in the United States" as the Second Circuit described it,[2] may never be built for want of a finding, the need for which should never have arisen in the first place.

And the pity is, the finding not only can and in common sense should be made, if is legally compelling that such a finding be made. The business of this separate statement is to show why and how, in barest outline, that is so.

It is unimportant whether we agree with the conclusion that the proviso in Section 4(e) requires a Commission finding with respect to the lands in question here. What is important is the conclusion by the United States Court of Appeals for the District of Columbia: "We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with 'public lands and reservations' as defined in Section 3(2). Congress was exercising, not only its power under the property clause of the Constitution but also its power to regulate commerce with the

[1] Including interest charged construction, land rights and reimbursement to Federal Government and to municipalities.

[2] *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, C.A. 2, Docket No. 25236, July 24, 1958.

Indian tribes and, therefore, *to allow alienation of the land here involved.*"[3] [Our emphasis.]

The controlling importance of this conclusion rests in its concession that alienation of part of a reservation subject to Section 4(e) of the Federal Power Act, is not *per se*, and as a matter of law, inconsistent with the purposes for which the reservation has been created.

Majority's position fails, we think, for two reasons. First, it confuses the means to achieving the end for which the reservation was created with the end itself. Second, it too narrowly construes the purpose for which the reservation was created.

The purpose for which this and any other Indian reservation is created is to assure a peaceful, reasonably comfortable and secure life for the tribes. In that fashion they are compensated for the means of maintaining a livelihood of which they had been deprived elsewhere. The ownership, occupancy and use of land is a means to that end. Particularly in the agrarian society prevailing in early 19th century America, land was a *sine qua non* to achieving that end.

Ownership of land was not an end in itself, however. In that respect, the physical thing comprising the reservation served the same purpose as the more metaphysical things such as exemption from certain state laws, and wardship status under the guardianship of the Secretary of the Interior. The reservations were not created to make land companies out of Indian tribes. Ownership, occupancy and use of land never should be elevated to a status more important than the end or purpose for which that ownership was designed. If called upon to measure whether the end

[3] *Tuscarora Indian Nation* v. *F.P.C.*, C.A.D.C., No. 14475, decided November 14, 1958, slip sheet opin. p. 11.

for which a reservation has been created will be furthered or frustrated by a proposed activity, then, we must not ask ourselves simply whether that activity will deprive the Indians of land. Rather we must inquire whether the proposed activity will interfere or be inconsistent with the assurance to the Indians of a peaceful, reasonably comfortable and secure life. Continued ownership, occupancy and use of the land given to or acquired by the Indians may or may not carry with it such an assurance. Indeed it is not difficult to imagine conditions under which continued ownership, occupancy and use of lands originally used by the Indians as a means to such end might be the worst thing for them. For example, if the location were endangered by radioactive fallout from nuclear explosion.

Certainly, we think, if the physical occupation of part of the land, the covering of it with some 65 feet of water, is all that we are to consider we are never to answer this problem. The District of Columbia Circuit knew that these lands would be physically occupied. Yet it asked us to determine whether their physical occupation was within our province to condone. It knew the lands might be alienated. Yet it asked us to rule whether that alienation was proper. Manifestly, if occupation and alienation, *per se*, were inconsistent as a matter of law, there would be nothing on which we could rule. The fact that we are making this determination at all is total proof that there is more to be answered than these simple questions whether the land of the Tuscarora will be occupied or alienated.

If possible alienation of the lands does not *ipso facto* require a finding of inconsistency or interference, *a fortiori*, the presence of positive showing that to alienate the land will further that purpose of the

reservation will argue strongly for it, all other factors under the Act being favorable, as they are here.

We must discard the simple fact of potential alienation as evidence of inconsistence or interference. Something more must appear. We search the record in vain for any. In fact, the record contains only assertions by counsel and others that it would be patently inconsistent for the reservoir and the Indians to occupy the land at the same time. There is plainly misdirected emphasis on occupation of specific land as the basis of inconsistence. Then there is the contention that the *amount* of land taken, measured as a proportion of the total, governs.

We think a far more rational test is whether the alienation—whether of one-half of one per cent or ninety-nine per cent,—would be inconsistent or would interfere with the purpose of the reservation. On this point, the record made out by the Tuscarora is fatally deficient. There simply is no positive showing that alienation of these lands, if accompanied by and done pursuant to, appropriate conditions will be inconsistent or interfere with the reservation's purpose. Rather it appears that appropriate conditions are possible.

The language of the proviso in Section 4(e) does not confine us to the issue whether the taking of land will be inconsistent or not. It directs us to determine whether the *license,* in its totality, will be inconsistent. The license contains much more than the authority to take land. The same proviso directs that the license, "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The record does show that if the alienation is through condemnation under Section 21, the appropriate Court will fix the compensation to be paid to the Indians. In addition, as the Second Circuit points out, the Secretary of the Interior or the Tuscarora may purchase substitute lands if sufficient funds are made available. Moreover, by the terms of the offers made by Power Authority, swamps would be drained, roads built, and other improvements made on the remaining lands.

It would be quite a simple thing to attach conditions to the license that would assure to the Tuscarora the continuation of the way of life which they have selected as their own. In fact, this proposed purchase of land brings to the Tuscarora an unprecedented opportunity to advance whatever way of life they had been following. Never before has such a chance come their way. And probably, never will it come again.

If it is land that they want, then land they can get. And better land, drained, improved and laced with roads. In fact we are told that options on virtually identical amounts of land have actually been obtained. We filed our motion for additional time in this cause on January 16 because of the pendency of negotiations respecting the acquisition of reservation lands. As all parties were aware, including ourselves, these negotiations were based, among other things, on the availability of substitute lands for use of the Tuscarora.

If it is improved farming facilities, homes, schools, health facilities they want, these are obtainable. Or if it is merely the security of knowing that an asset, in the form of land, is held in their tribal name, this too can be had.

These or many similar advantages, as may be suggested by the Secretary of the Interior and the Tribe

itself, may easily be inserted in this license as reasonable conditions to the permission to occupy these reserved lands. Certainly any lawful action that offers to the Tuscarora a chance to advance its tribal well-being and more fully to provide for those members of the Tribe who are yet unborn can hardly be said to be inconsistent or to interfere with the end for which the reservation was created. As we have seen and as Counsel for the Tribe has conceded, this purpose is to enable the Indians to live peacefully and harmoniously.

As long as the means are at our disposal to advance the end for which the reservation was created we should take advantage of them. The conditioning power inherent in our licensing authority is ample to do so.

The next, inevitable and only remaining conclusion is that the license will not be inconsistent with or interfere with it.

We ought to say so to the District of Columbia Circuit, require the Power Authority to meet the terms we find necessary to further the purpose of the Tuscarora Nation, as Power Authority has offered, and permit them both to go about their businesses.

WILLIAM R. CONNOLE,
FREDERICK STUECK,
Commissioners.

United States of America

Federal Power Commission

Before Commissioners Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

Project No. 2216

IN THE MATTER OF POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion No. 317-A

Opinion and Order Denying Application for Rehearing

(Issued February 25, 1959)

There is before us an application for rehearing filed February 10, 1959, and supplement thereto February 11, 1959, by the Power Authority of the State of New York with respect to our Opinion No. 317 issued February 2, 1959, in which we found under Section 4(e) of the Federal Power Act that the license issued to the Power Authority insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired. By permission the Tuscarora Nation filed an answer to the application for rehearing on February 17, 1959.

As set forth in our Opinion No. 317, the Power Authority was issued a license on January 30, 1958 (19 F.P.C. 186), in accordance with the Federal Power Act and Public Law 85-159, approved August 21, 1957 (71 Stat. 401). The license was to develop its Niagara Falls Project No. 2216 and involved as proposed, the use of about 1,383 acres of lands of the Tuscarora for a reservoir and incidental works. Our

Opinion No. 317 was issued upon remand by the United States Court of Appeals for the District of Columbia Circuit on November 14, 1958, to explore the possibility of making the finding required by Section 4(e) of the Federal Power Act, for the Court was of the opinion that Section 4(e) was applicable to the Tuscarora Lands as tribal lands under the definition of "reservations" in Section 3(2) of the Act.

In its application for rehearing the Power Authority contends that we have concluded erroneously that under Section 4(e) of the Act we may not license for reservoir purposes any land contained in a "reservation" within the meaning of the statute. This contention does not reflect the basis of our decision, which was that the particular power reservoir occupation of Indian land here involved would not meet the test of Section 4(e). We did not conclude that every occupation of reservation land was an interference with its purposes.

The Power Authority further contends in numerous particulars that we did not make correct or sufficiently detailed findings of fact. It contends that we did not make findings with respect to advantages accruing to the Tuscarora from the proposed transaction or with respect to the acquisition of equally desirable substitute lands for the Indians. This contention, we believe, is irrelevant, for we were properly concerned only with the purpose for which this Indian land was acquired, and were not directed to consider alternative proposals, which might or might not be sociologically desirable, but which might be consistent with the purpose of the present reservation. The Power Authority says that we should have made findings of fact on the purposes of the reservation, the ownership of the land, supervision by the United States and the legislative history of the 1957 Act which authorized

the project. We did make an essential finding of fact with regard to the purpose of the reservation, i.e. that it was acquired "for a homeland and a place to live and for farming and related uses". We were not required to make findings with respect to the other matters, inasmuch as we found that the reservoir use would be inconsistent with purposes found by us.

The Power Authority has also requested specific findings as to whether the licensing of certain smaller amounts of Indian land for the project would meet the requirements of Section 4(e), and as to whether or not any Tuscarora land is necessary for the project. Specifically, they refer to (1) 85.6 acres for a site on which transmission lines are being built; (2) 35 acres or any lesser amount for roads, and (3) 350 acres for reservoir purposes. The Commission is also requested to find whether licensing for reservoir purposes of any amount of Indian land less than 350 acres, or more than 350 acres but less than 1263 acres would interfere with the purposes of the reservation.

What the Power Authority appears to be attempting is an informal amendment of its license with an immediate decision upon it without the benefits of a hearing. In our opinion the Power Authority misconceives its remedy. If we made the findings requested we would deny other parties the opportunity to be heard upon the question whether a different project interferes with the reservation. Furthermore, there is no application for definite amendment to the license before us upon which we can pass judgment. A different size or location for the reservoir would greatly affect its relationship to the Indian lands, particularly as to the area and location of the land taken. We cannot predict what effect the taking might have on the Indian lands without knowing

precisely where they will be located, the type of land taken, and other relevant facts. With respect to the acreage for transmission lines and roads, we will, of course, consider these matters when they are properly brought before us.

The proper remedy for the Power Authority is to file an amendment to its license, with amended exhibits as necessary. In this way we can pass upon a definite proposal, and the rights of other parties will be protected. We would then be free to consider whether a taking of Indian lands in the amount of any lesser acreage would be consistent with the purpose of the reservation.

The Power Authority makes the further contention that Commissioner Hussey improperly participated in the decision since he did not hear oral argument because of illness. The majority consisted of Chairman Kuykendall and Commissioners Kline and Hussey while Commissioners Stueck and Connole dissented. There is no requirement of oral argument in this proceeding arising from the Administrative Procedure Act, the Federal Power Act or our Rules. Commissioner Hussey, of course, had before him and read the transcript of the oral argument. No rights of the applicant were abrogated. *Sisto* v. *C.A.B.*, 179 F. 2d 47, 53–54 (C.A.D.C.), *Eastland Co.* v. *F.C.C.*, 92 F. 2d 467 (C.A.D.C.) *certiorari denied* 302 U.S. 735.

The Court of Appeals remanded the case in order that we might explore the possibility of making a finding required by Section 4(e). Had Commissioner Hussey refrained from voting the finding desired by the Power Authority could not have been made.

While we have reached a conclusion in Opinion No. 317 contrary to the Power Authority and are denying it rehearing, we do not feel we are precluded from

contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

The Commission *finds:*

No new facts have been presented or alleged, and no new principles of law have been set forth in the application for rehearing as supplemented which either were not fully considered by the Commission before it entered its Opinion No. 317 on February 2, 1959, or having now been considered, warrant rehearing or modification of the aforesaid order.

The Commission *orders:*

The aforesaid application for rehearing as supplemented is denied.

By the Commission:

Commissioner Hussey concurring, filed a separate statement. Commissioners Stueck and Connole, concurring in part, dissenting in part, filed a separate statement.

/s/ J. H. Gutride,
JOSEPH H. GUTRIDE,
Secretary.

HUSSEY, Commissioner, *concurring:*

I concur in the order denying application for rehearing herein.

Eminent domain is a harsh and extraordinary remedy. All laws granting the right of eminent domain should be strictly construed, and the burden of proof in all such cases would rest on the one who seeks to exercise such rights. We are asked to make a finding under Section 4(e) of the Federal Power Act that the taking of 20% of the Indian lands, including 37 homes, would not interfere with the pur-

pose for which the reservation was created. Such a finding would be the basis for a license under the Federal Power Act, which in turn would be a predicate for the exercise of the right of eminent domain by the Power Authority, and the burden of proof of non-interference under Section 4(e) would be upon the Power Authority.

In my judgment the Power Authority simply has failed to sustain that burden.

One of the reasons urged for rehearing by the Power Authority was that we did not unequivocally make the finding that the lands which they sought to occupy are the only ones available for these particular purposes. I do not believe that the Power Authority has proven that the particular lands which they desire to occupy would be the only lands available for that purpose, either on or off the reservation.

An examination of Exhibit No. 315 mentioned in their Motion for Rehearing shows a swamp area within the reservation stated to contain approximately 350 acres. Instead of taking all of these swamp lands, the original project outlined in green on Exhibit 315 takes in only 100 acres of the swamp and substitutes highly improved lands and takes in other areas occupied by 37 homes. From an examination of this Exhibit, it would appear that the Power Authority could take all of the swamp lands and an additional 350 acres proposed in their amended application for rehearing, and some lands lying between these two areas, which would necessitate the removal of only one or two homes, and would cause minimum interference with the use of the reservation and would still make the project feasible.

Instead, the Power Authority has so designed this project to take in only a small amount of the swamp, and to take improved lands constituting 20% of the reservation and requiring the removal of 37 homes. This is exactly the type of situation that the Indian treaties and protective laws were designed to prevent.

In its Supplemental Petition for Rehearing the Power Authority now proposes to reduce the project and take only about 350 acres within the Indian reservation which would not cause the removal of any homes. In my judgment, this is a new project which would require a new hearing and a modified license, and it cannot be obtained through a motion for rehearing. However, if proper application were filed for such modified license, I see no reason that the matter could not be reopened and be reconsidered.

JOHN B. HUSSEY, *Commissioner.*

CONNOLE and STUECK, Commissioners, *concurring* in part, *dissenting* in part:

For reasons fully set out in our separate statement, filed with the Commission's Opinion No. 317 issued February 2, 1959, we dissent from so much of this order that fails to reconsider the earlier action of the Commission. Accordingly, we do not reach the question whether this Petition for Rehearing, as supplemented, amounts to an attempt by the Power Authority of the State of New York informally to amend its license without a hearing. It is clear, however, that since an affirmative finding under the proviso of Section 4(e) of the Federal Power Act could and should have been made by the Commission with respect to the previously proposed taking of a larger tract of Tuscarora land, we are necessarily bound to a similar finding with respect to the taking of a part of the same tract.

We concur that Commissioner Hussey's participation in this matter did not invalidate the order.

We concur also that the Commission is not precluded from contesting the interim holding of the Court of Appeals with respect to the applicability of Section 4(e) of the Power Act to these Tuscarora lands.

WILLIAM R. CONNOLE,
FREDERICK STUECK,
Commissioners.

STATUTES INVOLVED

1. Public Law 85–159, approved August 21, 1957, 71 Stat. 401, provides:

> AN ACT To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.
>
> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:
>
> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest

rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New

York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to pri-

vately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any con-

flict, the provisions of this Act shall govern in respect of the project herein authorized.

* * * * *

2. The pertinent provisions of the Federal Power Act, 49 Stat. 838, as amended, 16 U.S.C. 791a, *et seq.*, are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which

Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoy-

ment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * *

* * * * *

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 12, 1959

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28 U. S. C. § 1254(1) 2

Niagara Redevelopment Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836a) 2

IN THE

Supreme Court of the United States.

OCTOBER TERM 1958

No. ------

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case March 24, 1959. Petition for certiorari has also been filed by the Federal Power Commission and is pending. A certified copy of the transcript of the record in the case has been filed by the Federal Power Commission.

Citations to Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit dated November 14, 1958 and its order of March 24, 1959, are not yet reported. Copies are set forth in the Appendix to the petition for certiorari filed by the Federal Power Commission at pages 25-37.

Jurisdiction

A Memorandum Opinion was issued by the District of Columbia Court of Appeals November 14, 1958. Petitions for reconsideration of interlocutory holdings contained therein were denied without opinion and the judgment of the court entered on March 24, 1959. On motion of the Federal Power Commission, stay of the issuance of the court's opinion and judgment in lieu of mandate was granted April 17, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and § 313(b) of the Federal Power Act.

Questions Presented

The following questions are presented:

1. Does Tuscarora land in which the United States owns no interest constitute part of the public lands and reservations of the United States within the meaning of § 4(e) of the Federal Power Act?

2. Assuming *arguendo* that the Tuscarora reservation is a "reservation" of the United States within the meaning of § 4(e) of the Federal Power Act, was the requirement for a finding under the first proviso of § 4(e) superseded by the provision of the Niagara Redevelopment Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836a) directing that a license be issued to the Authority for a project to utilize all water of Niagara River available under international agreement?

3. Did the District of Columbia Court of Appeals usurp an administrative function in directing the Commission to amend its licensing order "to exclude the power" of the Authority as licensee to condemn Tuscarora lands?

4. May Tuscarora relitigate in the District of Columbia Court of Appeals questions decided by the Court of Appeals for the Second Circuit in a proceeding (i) brought by Tuscarora in a forum of its own choice prior to institution of

review proceedings in the District of Columbia Circuit and (ii) progressed to judgment in a Second Circuit District Court before the District of Columbia Court of Appeals obtained jurisdiction through the filing by the Federal Power Commission of a transcript of its proceedings?

Statutes Involved

The statutes involved are set forth in the Appendix to the petition for certiorari of the Federal Power Commission.

Statement

Petitioner is the licensee of the Federal Power Commission for construction of the Niagara Power Project. It wishes to present additional facts not contained in the petition for certiorari filed by the Commission with respect to the related litigation in the Second Circuit Court of Appeals, and to point out the legal dilemma in which it finds itself in connection with transmission lines already built on Tuscarora land.

Tuscarora on April 18, 1958, instituted a proceeding in a District Court in the Second Circuit to enjoin the appropriation of Tuscarora land by the Authority and for a declaratory judgment that neither New York State nor the Authority can acquire any Tuscarora land by any method. A judgment adverse to Tuscarora was rendered June 24, 1958. *Tuscarora Nation* v. *Power Authority*, 164 F. Supp. 107 (W. D. N. Y., 1958). The review petition in the present case was filed by Tuscarora in the District of Columbia Court of Appeals on May 16, 1958 and the Power Commission's transcript of record transmitted to that Court June 25, 1958. Not until then did the District of Columbia Court acquire exclusive jurisdiction. (Federal Power Act, § 313(b)).

Tuscarora on June 30, 1958 filed notice of appeal from the District Court judgment to the Second Circuit Court of

Appeals. That Court on July 24, 1958, affirmed the District Court judgment insofar as it held that the Authority had the right to condemn Tuscarora land. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885, cert. den. 358 U. S. 841. The Court held that the Authority as a licensee of the Commission (which was directed by the Niagara Development Act to issue a license to the Authority) is authorized to exercise the right of eminent domain according to the procedures specified in § 21 of the Federal Power Act, but that New York State which had taken steps to appropriate the land on behalf of the Authority had no inherent power to acquire Tuscarora land and that appropriation under New York State statutes was not a procedure conforming with § 21 of the Federal Power Act. Certiorari, sought by Tuscarora, was denied by this Court on October 13, 1958 (358 U. S. 841).

New York State appealed September 3, 1958 from so much of the judgment as denied that the State has a sovereign right of eminent domain over Indian land and denied that appropriation in the name of the State on behalf of its agency the Authority conforms to Section 21 of the Federal Power Act. That appeal is still pending in this Court.

The Authority, on July 29, 1958, promptly following the judgment of the Second Circuit Court of Appeals, instituted a proceeding in the United States District Court for the Western District of New York, for condemnation of the 1,383 acres of Tuscarora land required for construction of the project as licensed. On September 15, 1958 the District Court authorized the Authority to take possession of 85.6 acres for construction of transmission lines and the Authority has already built such lines. After denial of certiorari by this Court, the District Court authorized the Authority to take possession of the remaining Tuscarora land necessary for the project as licensed except within 200 feet of dwellings located on it. The Authority has deposited with the District Court security of $2,000,000 in cash.

Reasons For Granting The Writ

A. The Court Below Has Erroneously Decided Important Questions of Federal Law Which Should Be Settled By This Court.

Section 4(e) of the Federal Power Act authorizes the Federal Power Commission to issue licenses (1) for the development of power with respect to bodies of water over which Congress has jurisdiction under the Commerce Clause, (2) upon any part of the public lands and reservations of the United States and (3) for the purpose of utilizing surplus water from government dams. This authorization is followed by a proviso that licenses within any such reservation, i.e., a reservation of the United States, shall be issued only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and upon conditions deemed necessary by the Secretary of the department under which the reservation falls. Whether the Tuscarora reservation is a reservation of the United States within the meaning of that proviso and whether, in any event, § 4(e) is inapplicable because it is superseded by the Niagara Redevelopment Act, are important questions of Federal law which have not been, but should be, settled by this Court.

(1) Tuscarora Land is Not Part of a Reservation of the United States Within the Meaning of Section 4(e).

The word "reservations" as used in the findings proviso of § 4(e) immediately following the authorization to issue licenses on the "public lands and reservations of the United States" obviously has the same meaning in the proviso as it has a few lines above. For the findings proviso to apply the reservation must be one that is "a part of the public lands and reservations *of the United States*". [emphasis supplied].

Section 3(2) of the Federal Power Act defines "reservations" as meaning "national forests, tribal lands embraced within Indian reservations, military reservations, and *other* land and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;" [emphasis supplied].

The Tuscarora, not the United States, own the lands in the Tuscarora reservation. The Court below, however, concluded that, in any event, "this reservation is one in which the United States has an interest". It found this interest principally in the doctrine of guardianship of the United States over Indians. The "interests in lands" contemplated by § 3(2) is a property interest, not the interest of a guardian, which cannot be "owned by the United States". Further, as the record shows (T. 7220-3; 7234-5; 8331-44), the Tuscarora land, unlike many Indian reservations, is not land withdrawn, reserved or withheld from private appropriation and disposal under the public land laws, nor does it fall under the supervision of any department of the United States Government, as is necessary to make the finding proviso of Section 4(e) applicable (T. 8278-9; 8185-96; 6187-98; 6724-7).

(2) Section 4(e) of the Federal Power Act is Inapplicable Because the License Was Issued Under the Authority of the Niagara Redevelopment Act.

The Niagara Redevelopment Act provides that "the Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority" for the Niagara power project. The license so issued is subject to certain conditions (not here relevant) specified in that Act in addition to conditions deemed necessary and

required under the terms of the Federal Power Act. The "conditions" of that Act are set forth in § 10, not in § 4(e). The first proviso of § 4(e) requiring findings is not one of the conditions of the Act but a mere limitation upon the power to issue a license when the authority for that issuance is to be found in § 4(e). Here the authority for issuance is found in the Niagara Redevelopment Act and the findings proviso of § 4(e) is, therefore, inapplicable.

B. The Court Below Has Departed From The Accepted And Usual Course of Judicial Proceedings.

(1) THE JUDGMENT OF THE COURT BELOW IS A USURPATION OF CONGRESSIONAL AND ADMINISTRATIVE AUTHORITY.

The judgment of the Court remanded the case

> "... to the Federal Power Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes."

The Commission's order does not give the power to condemn. That power is one given by Congress by § 21 of the Federal Power Act to licensees of the Commission and the Second Circuit Court of Appeals specifically held the licensee had such power with respect to Tuscarora land. The Commission has no statutory authority to deprive a licensee of a power that Congress gives the licensee, the existence of which under the circumstances prevailing had already been judically confirmed. Furthermore, even if the Commission had any such power, the judgment of the Court below would be a usurpation of administrative authority directly contrary to the holding of this Court in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 (1952).

This departure by the Court below from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

(2) THE COURT BELOW HAS PERMITTED TUSCARORA TO RELITIGATE BEFORE IT QUESTIONS DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS, AND HAS ENTERED AN ORDER WHICH EXPLICITLY CONTRADICTS AND IN PRACTICAL EFFECT NULLIFIES THE EARLIER JUDGMENT OF THE SECOND CIRCUIT AND PLACES THE LICENSEE AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK IN A LEGAL DILEMMA WITH RESPECT TO THE CONDEMNATION OF TUSCARORA LAND, INCLUDING THAT UPON WHICH TRANSMISSION LINES HAVE ALREADY BEEN BUILT.

The Second Circuit Court of Appeals held (and this Court denied certiorari) that the Authority has the right as a licensee to exercise the power of eminent domain with respect to Tuscarora land, including land needed for transmission lines, for the project. That Court found, in the Niagara Redevelopment Act, Congressional consent to the exercise of such power. The District of Columbia Court of Appeals permitted this question to be relitigated and expressly found Congress did not consent to the taking of Indian lands through the Niagara Redevelopment Act, but did so only through § 4(e) of the Federal Power Act. The result of this holding, according to the Court, is that Commission findings under the first proviso of § 4(e) are a prerequisite to licensing a project to include Tuscarora land.

Since the Commission was unable to make the § 4(e) finding with respect to the 1,383 acres of Tuscarora land sought, the Authority is in the anomalous position of having had the Second Circuit Court of Appeals hold that it has the right to condemn the land but having the District of Columbia Court of Appeals hold that the Commission cannot license the use of the land. Further, the practical effect of the District of Columbia Court of Appeal's decision is to nullify the action of a District Court in another circuit authorizing the Authority to take possession of Tuscarora lands, including 85.6 acres for transmission lines already constructed, and to put into a state of con-

fusion the condemnation proceedings pending in that court. The District of Columbia Court of Appeals, in its order of March 24, did not specifically refer to the land for the transmission lines but only to lands to be used for reservoir purposes, but its November 14 opinion states, and Tuscarora contend, that no Tuscarora land can be used for any project purpose, unless a § 4(e) finding is made. If the Commission in the future were to make a 4(e) finding to the effect that the licensing of 85.6 acres of Tuscarora land for transmission line purposes would not interfere and is not inconsistent with the purpose for which the Tuscarora reservation was established, a legal dilemma would nevertheless result. This is so because if Tuscarora land constitutes part of a reservation of the United States within the meaning of § 4(e), it also does so within the meaning of § 10(e) and compensation for the use of the land must take the form of annual rental payments to the United States in an amount fixed by the Commission. On the other hand, if the judgment of the Second Circuit is correct and the Authority has the right to condemn the land, compensation is fixed by the District Court in the condemnation proceeding under the Fifth Amendment.

Tacoma v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958) is not applicable. The facts there are the reverse of those here. There the decision of the Court of Appeals having exclusive jurisdiction to review the Commission order had become *res judicata* prior to the collateral proceeding. The Supreme Court was careful to point out that exclusive jurisdiction of "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms" arises "upon judicial review of the Commission's Order", not before. Here the question of Congress' having consented to the use of Tuscarora land for the Niagara Power Project was *res judicata* before the Court of Appeals for the District of Columbia Circuit acquired jurisdiction by the Commission's filing a transcript of its proceedings.

The appeal taken by the State of New York to this Court in No. 386 presents the question as to whether the State has inherent power of eminent domain over Indian land within its borders for public purposes—a power which it has exercised for 175 years. It also presents the question of whether the State's appropriation procedure is a valid exercise of the power of eminent domain under § 21 of the Federal Power Act. These questions should be disposed of by this Court at the same time it disposes of this case.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 12, 1959.

FILE COPY

Brief of the
Respondent
in opposition

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*.

No. [redacted] 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 911

FEDERAL POWER COMMISSION, *Petitioner,*

v.

TUSCARORA INDIAN NATION, *Respondent.*

No. 921

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner,*

v.

TUSCARORA INDIAN NATION, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Court of Appeals for the District of Columbia Circuit, issued on November 14, 1958, is reported at 265 F. 2d 338. That court's final order, dated March 24, 1959, is reported at 265 F. 2d 338, 344.

QUESTIONS PRESENTED

1. Whether the specific statutory restrictions in 25 U.S.C. § 177 and § 233 upon the alienation of Indian tribal lands and the specific protections in 16 U.S.C. § 797(e) against the indiscriminate licensing of Indian tribal lands have in any way been superseded or modified by Public Law 85-159, 71 Stat. 401, a general statute which, without describing the location or character of the project facilities, merely authorizes the construction of a power project and does not mention either Indians or their property.

2. Whether the Tuscarora Reservation is to be excepted from the well-established rule that federal protections apply to Indian lands generally and thus is to be excluded from the benefits of the proviso in Section 4(e) of the Federal Power Act solely because the Tuscarora Nation holds fee title to its tribal lands, even though the United States still retains the power to control the alienation of those lands and maintains a guardianship relation to the Nation.

3. Whether the Court of Appeals, having determined that a particular finding was essential to the validity of a license and having been advised by the Federal Power Commission after extensive hearings that such a finding could not be made, was compelled to remand this matter to the Commission for further consideration rather than ordering the Commission to amend the license accordingly.

STATUTES INVOLVED

In addition to the statutes cited in the Appendix of the petition in No. 911, pp. 56-62, the following statutes also are involved:

R.S. § 2116, 25 U.S.C. § 177:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * * "

Act of September 13, 1950, 25 U.S.C. § 233:

> "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: * * * *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: * * *."

STATEMENT

The relevant facts, in chronological order, are as follows:

1. In 1950, the United States and Canada entered into a treaty establishing the amount of water each nation may divert from the Niagara River for power purposes. 1 U.S.T. 694.

2. By the Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, Congress directed the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara

River permitted to be used by international agreement." In this statute Congress further directed the Commission to impose certain specified conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act." Congress, however, did not designate the location of the power project, describe the nature of the project works or otherwise approve any particular engineering plan for power development.[1] Moreover, Congress in Public Law 85-159 did not refer to the Tuscarora Indian Nation or the Tuscarora Reservation. Indeed, the legislative history of this 1957 statute is devoid of the slightest indication that Congress or any of its committees knew or even suspected that Indian land ultimately might be desired in construction of the Niagara Project.

3. On January 30, 1958, after hearings, the Federal Power Commission issued a license to the New York Power Authority, over the protest of respondent, the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its Reservation for a water storage reservoir. Respondent's objection to this project facility was based in part upon the licensee's lack of legal authority to acquire Indian lands without the express consent of Congress. The Commission declined to pass upon that question on the ground that "other lands are available for reservoir use if the Applicant [Power Authority] is unable to ac-

[1] Actually, given the fact that the amount of Tuscarora land sought repeatedly changed prior to April 15, 1958, the Power Authority's own concept of the project could not have become final until almost a year after Congress acted.

quire the Indian lands, although alternative lands may be more expensive." R. 5842.

4. In denying the Tuscarora Nation's petition for rehearing, the Commission on March 21, 1958, again refused to decide whether the Power Authority lawfully could acquire Indian lands, ruling that this issue was "a question to be resolved by a court of competent jurisdiction." R. 5879. The Commission further held that respondent's property was not part of a "reservation" within the meaning of Section 4(e) of the Federal Power Act, and hence need not be made the subject of a finding by the Commission as to whether the license would "interfere or be inconsistent with the purpose for which such reservation was created or acquired." R. 5880.

5. On May 16, 1958, less than 60 days after the denial of the rehearing application, respondent filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia Court thereby acquired "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part." *Ibid.*

6. In the meantime, on March 21, 1958, the Power Authority of the State of New York filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300.35 acres of land belonging to the Tuscarora Nation for use in the Niagara Project. On April 15, 1958, however, the Power Authority wholly abandoned this judicial proceeding and, purportedly acting pursuant to a newly-adopted state law, attempted to appropriate over 1383 acres within the

Tuscarora Reservation by the mere filing of a map in the office of the State Superintendent of Public Works.

7. Faced with an imminent appropriation of its property under state law before the District of Columbia court could determine the validity of the basic license, the respondent filed a complaint in the United States District Court for the Southern District of New York on April 18, 1958, seeking, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands belonging to the respondent without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation, condemnation or otherwise lands belonging to the respondent in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain exceptions, was granted by the court. The case then was transferred to the United States District Court for the Western District of New York. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

8. On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 107 (W.D. N.Y., 1958). Immediately thereafter, respondent prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision.

9. On July 24, 1958, the Court of Appeals for the Second Circuit reversed the judgment below insofar as the District Court had dismissed the complaint and thereby had blocked the Tuscarora Nation from any relief by way of a declaration of rights. Specifically, the Court of Appeals held that the United States, by virtue of 25 U.S.C. § 177 and § 233, had retained paramount authority to control the alienation of Indian tribal lands in the State of New York, although, of course, these protective statutes were subordinate to the Federal Government's own right of eminent domain. Since the appropriation proceedings instituted by the Power Authority under New York law did not stem from or otherwise involve the exercise of any Federal condemnation power, these proceedings were vacated and annulled.[2] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958).

10. The Court of Appeals for the Second Circuit further ruled, however, that, if the Commission license were valid—an issue which concededly was still pending before the District of Columbia court—then the Power Authority could exercise a Federal right of eminent domain with respect to the Tuscarora Reserva-

[2] This aspect of the Court of Appeals ruling, dealing with the inapplicability of the state appropriation procedure, is the subject of an appeal still pending in this Court filed by the New York Superintendent of Public Works. *Johnson* v. *Tuscarora Nation of Indians*, No. 386, Oct. Term, 1958. On July 27, 1958, however, the Power Authority abandoned the state appropriation procedure and instituted a condemnation suit in the United States District Court for the Western District of New York. *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D. N.Y.). In view of this action, respondent herein has filed a suggestion of mootness in No. 386.

tion through regular condemnation proceedings. In support of this conclusion, the court cited not only Section 21 of the Federal Power Act, 16 U.S.C. § 814, but also Public Law 85-159, 71 Stat. 401, the 1957 act directing the issuance of a license to the Power Authority for the Niagara Project. As to the latter statute, the court said that Congressional permission for the taking of respondent's land could be found by inference "from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation." 257 F. 2d at 893.

11. On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the judgment of the Court of Appeals for the Second Circuit, with one exception not here relevant, conditioned upon the filing of a petition for a writ of certiorari by the Tuscarora Nation on or before September 19, 1958. *Tuscarora Nation of Indians* v. *Power Authority*, 79 Sup. Ct. 4 (1958).

12. On September 19, 1958, the Tuscarora Nation duly filed a petition for a writ of certiorari, requesting interim relief from the impact of the Second Circuit decision until the District of Columbia Court could determine the validity of the license and asserting that the Second Circuit decision raised a novel and important question as to the extent to which a general statute which does not mention an Indian tribe or its lands can be said to express a Congressional intent to lift specific federal protections against the alienation of such lands. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, No. 384, Oct. Term, 1958. This petition was denied on October 13, 1958. 358 U.S. 841. But since the filing of the peti-

tions in the instant cases, the Tuscarora Nation has filed a motion for leave to file a petition for rehearing as to the denial of certiorari in No. 384. That motion, which is presently pending before this Court, suggests that it would be appropriate to grant certiorari, limited to the question involving the interpretation of Public Law 85-159, 71 Stat. 401, if the Court grants certiorari in either or both of the instant cases.

13. On November 14, 1958, the Court of Appeals for the District of Columbia Circuit, after an expedited hearing, issued a memorandum opinion which is the basis for the petitions in the instant cases. *Tuscarora Indian Nation* v. *Federal Power Commission*, 265 F. 2d 338 (C.A.D.C., 1958). The court there held (a) that the United States, by virtue of 25 U.S.C. §§ 177, 233, controls the alienation of lands within the Tuscarora Reservation and that these lands cannot be taken by the Power Authority for reservoir purposes without the consent of the United States, (b) that such consent is not to be found in the 1957 statute authorizing the issuance of a license to the Power Authority, Public Law 85-159, 71 Stat. 401, (c) that the 1957 statute obliged the Commission in licensing the Power Authority to adhere to all conditions required by the Federal Power Act, including the proviso in Section 4(e) that projects may be located within Indian reservations "only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired", and (d) that the Commission thus could not issue a license for the construction of a reservoir on Tuscarora lands unless it made the finding required by this proviso in Section 4(e). Accordingly, the case was remanded to the Commission "that it may explore

the possibility of making that finding" and the court retained jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to the limited remand. The Commission was given fifteen days during which to respond.

14. On November 17, 1958, the Commission issued a Notice of Further Hearing "upon the questions presented and for the purposes set forth in Section VII" of the November 14 opinion of the Court of Appeals, i.e., on the possibility of making the required Section 4(e) finding. 23 Fed. Reg. 9101. That hearing commenced on November 24, but became so protracted and covered such a host of issues beyond what was specified in Section VII of the court opinion that the Commission was forced to obtain numerous extensions of time in which to report its action back to the Court of Appeals.

15. Finally, on February 2, 1959, the Commission, after consideration of the exhaustive record, the detailed written briefs and the lengthy oral argument, determined that "the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." Pet., No. 911, p. 41. In other words, the Commission concluded that the finding which the Court of Appeals had found essential as a condition precedent to a valid grant of a license on Indian lands could not be made. On February 25, the Commission denied the Power Authority's application for a rehearing of this decision. Pet., No. 911, p. 49. The Commission's holding that a Section 4(e) finding could not be made in this case never has been appealed and, therefore, is final and not before this Court.

16. On March 24, 1959, the Court of Appeals denied all motions for reconsideration of its memorandum opinion of November 14, 1958, and entered a final order approving the license issued to the Power Authority for the Niagara Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." The court further ordered "that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes."

17. In the meantime, on March 2, 1959, the Power Authority filed with the Commission an application for an amended license which requests permission to construct a storage reservoir wholly outside the Tuscarora Reservation. In that application the Power Authority states that it "cannot afford to await the outcome of further litigation, but must proceed with an amendment to the license and construction of the reservoir [off Tuscarora land] without further delay." The Commission has given official notice of a hearing on this application. 24 Fed. Reg. 1711.

ARGUMENT

The decision of the Court of Appeals for the District of Columbia Circuit is so eminently correct and so devoid of issues of an important or recurring nature as to warrant the denial of the petitions for writs of certiorari in both No. 911 and No. 921. The major grounds for refusing review of the judgment below may be summarized as follows:

(1) The Court of Appeals in this case has done no more that apply to a particular set of facts the canons

of statutory construction, repeatedly announced and implemented by this Court, that federal protections over and restrictions on Indian lands shall not be affected by general legislation unless Congress clearly manifests a contrary intent, and that the laws relating to Indians shall be liberally construed in favor of the Indians. Petitioners herein have pointed to no valid reason why these beneficent and time-honored principles, so integral to the guardianship of the United States over Indian tribes, should be reviewed or reversed. Similarly, petitioners have shown no valid reason why the Tuscarora Reservation should be excepted from the rules of law governing Indian lands generally or, even if such an exception were arguable, why an aberration relating to one reservation in one state should be worthy of consideration by this Court.

(2) The alleged conflict between the court below and the Court of Appeals for the Second Circuit over the interpretation of Public Law 85-159, 71 Stat. 401, has been resolved in such an authoritative fashion by the District of Columbia court in the exercise of its exclusive jurisdiction over the matter as to drain the Second Circuit decision on that issue of all force and effect and to deprive the conflict of current life. Moreover, even if a true conflict exists, the same question cannot possibly arise in litigation involving other parties so that any resolution of differing views by this Court would be only of parochial significance.

(3) The Niagara Power Project is truly an enterprise of national importance. The record in this case, though, shows that Tuscarora lands are not now and never were essential to that project. The inclusion or exclusion of respondent's property, therefore, does not itself present an issue of national importance.

With respect to statutory construction, the decision below properly is bottomed on a recognition that the United States always has retained the power to govern and control the territory reserved and held by Indian tribes for their permanent use and occupancy. *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867); *Creek County* v. *Seber*, 318 U.S. 705 (1943). This paramount federal power over Indian lands long has been codified by Congress, the key statute in this case (25 U.S.C. § 177, Rev. Stat. § 2116) providing that no purchase, grant, lease or other conveyance of lands from any Indian nation shall be valid unless made by treaty or convention with, or under the auspices of, the Federal Government. In 1950, when transferring civil jurisdiction over Indian reservations in New York from the United States to the State (25 U.S.C. § 233, 64 Stat. 845), Congress carefully retained exclusive federal power over the alienation of Indian tribal lands.

Both the court below and the Court of Appeals for the Second Circuit acknowledged that the foregoing statutes dictate that the consent of the United States must be obtained before any alienation of Tuscarora land can be permitted, whether by way of condemnation or otherwise. Such has been the consistent viewpoint of the Department of the Interior and the Department of Justice.[3] And, significantly, neither

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[3] In an Opinion dated May 4, 1900, Assistant Attorney General Willis Van Devanter, later an Associate Justice of this Court, ruled that 25 U.S.C. § 177 barred the Secretary of the Interior from approving a lease on the Tuscarora Reservation in the absence of authority from Congress. R. 5323-4. As recently as July 9, 1958, Elmer F. Bennett, then Solicitor and now Undersecretary of the Interior Department, expressed the view that 25 U.S.C. § 233, 64 Stat. 845, preserved the "applicability of R.S. Sec. 2116, 25 U.S.C. 177 to Indian tribal lands in New York." R. 5328-9.

petitioner in the instant cases even mentions, let alone disputes, this paramount authority of the United States over respondent's property and the necessity for some form of express consent by the United States before these lands may be condemned or licensed for use by the Power Authority.

The correctness of the decision below stands out plainly in this setting of paramount federal protections over Indian lands and the need for express consent to their alienation. All that the Court of Appeals had done here is to insist upon adherence to the foregoing basic doctrines and to apply recognized principles of statutory interpretation in determining whether and, if so, the extent to which Congress has authorized the taking of these particular Tuscarora tribal lands. In following this course, the court has neither announced a new principle of law nor created any precedent necessarily applicable to any statutory attempt to condemn the tribal lands of another Indian nation. See, for example, *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890).

To recapitulate, the court in this case simply and properly decided that laws designed to protect Indian tribes in the occupancy of their lands—such as Sections 177 and 233 of Title 25, and Section 797(e) of Title 16, of the United States Code—are to be interpreted broadly so as to give the fullest possible protection to the Indian beneficiaries. *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899). The court further observed that any laws claimed to be in derogation of such protection must be strictly construed and limited to the precise bounds of what Congress has clearly stated by way of consent to the alienation of Indian lands. More

specifically, the court recognized that general acts of Congress which, as in the case of Public Law 85-159, do not mention Indian tribes or their lands cannot be held applicable to them "unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins*, 112 U.S. 94 (1884). And, with respect to the impact of the Federal Power Act, the court concluded that the protections accorded tribal lands within Indian reservations under Section 4(e), 16 U.S.C. § 797(e), must be fully honored.[4]

This case is significant, therefore, solely as an example of a correct application of accepted principles of statutory interpretation to a particular and non-recurring fact situation. As such, the case does not merit full consideration and disposition by this Court.

To contend that this case is not worthy of further review, of course, is not to deny the importance of the Niagara Project. The obvious public interest in utilizing available water power, however, does not inject into every case growing out of the manifold legal problems created by the project the elements of importance which alone warrant the exercise of this Court's certiorari jurisdiction. Within the scope of the vast Niagara Project can arise many judicial determinations, of which the instant one is an example, which are contrary to the position advanced by the licensee or the United States, but which obviously are correct and lacking in the significance so necessary to this Court's discretionary review.

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[4] Petitioners are in the uncomfortable position of urging that the Tuscarora Reservation is within the scope of the Federal Power Act to the extent of losing the protections of 25 U.S.C. § 177, but not to the extent of being entitled to the protections of Section 4(e).

Hence the importance of the case from the certiorari standpoint is in no way enhanced by the Solicitor General's speculation (Pet., No. 911, p. 11), unsupported by the record,[5] that the decision below may result in reducing "the dependable capacity of the project by one-sixth, a loss of 300,000 kilowatts of capacity." The undeniable fact is that as of January 30, 1958, when the Commission issued the license to the Power Authority without regard to the pertinent provisions of the Federal Power Act respecting Indian reservations, the Commission found that (R. 5842):

> "[. . . other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive."

In other words, the Power Authority had a choice, in 1957-8 as well as now, of selecting various alternative lands which still would permit a reservoir large enough in area to maintain the original projected

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[5] In holding on February 2, 1959, that the proposed storage reservoir would be inconsistent with the purpose for which the Tuscarora Reservation was created, the Commission also commented that the Power Authority's inability to use Indian lands would result in a reduction in the capacity of the project. Pet., No. 911, p. 40. In addition to being sheer dicta, this statement relates to a matter outside of the District of Columbia court's mandate on remand and beyond the scope of the Commission's own Notice of Hearing (see pp. 9-10, *supra*), and no evidence relating thereto legitimately is in the record. Moreover, the Commission was not speaking of facts existing on January 30, 1958, but of a situation which might exist in 1959, after the Power Authority had proceeded for more than a year to construct the project on and adjacent to the Tuscarora Reservation in complete disregard of respondent's rights.

kilowatt capacity of the project.[6] The Power Authority's *voluntary* determination first to insist upon Tuscarora land and then to seek a smaller reservoir if Tuscarora land cannot be acquired is a reflection of its own intransigence rather than of the importance of the decision below. Nor does the added cost of the alternative lands lend significance to the case. As the court below noted (Pet., No. 911, p. 35):

> "We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation."

In short, this case involves nothing more than an attempt by petitioners to ignore or misconstrue the historic statutory safeguards against indiscriminate alienation of Indian tribal lands in order to save a few dollars. Such a raid on the Tuscarora Reservation cannot be sanctioned. As this Court has reiterated many times, *United States* v. *Kagama*, 118 U.S. 375, 383-4 (1886):

> "These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States. . . . Because of the local ill feeling,

[6] The Commission reiterated on February 2, 1959, its earlier conclusion that "it would be physically possible to relocate the pumped-storage reservoir so as to eliminate the Indian lands. . . ." Pet., No. 911, p. 39; see also, concurring opinion of Commissioner Hussey in denying petition for rehearing, February 25, 1959, Pet., No. 911, p. 54. The Power Authority's application for amendment of license, filed with the Commission on March 2, 1959, calls for a smaller reservoir which, without using any alternative land, would make up most of the claimed loss in capacity through higher dikes. Presumably as much or more than the original kilowatt capacity could be obtained if some or all of the alternative land also were taken.

> the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

Against this background, the specific issues which petitioners seek to raise appear, and can be disposed of as, undeserving of further consideration.

A. The Conflict as to Public Law 85-159

As the opinion below fully demonstrates, Congress in no way consented to or authorized the taking of Tuscarora lands through enactment of Public Law 85-159, 71 Stat. 401. This statute in very general terms directed the Commission to issue a license to the Power Authority to construct a power project utilizing all of the United States' share of the Niagara River water. Not a word appears in the statute with reference to Indian lands or with reference to a storage reservoir or other project facilities at any particular location.

Furthermore, there is not a single word in the legislative history of the 1957 act indicating that even the remotest possibility of a reservoir encompassing Indian lands was called to the attention of the legislative committees or the Houses of Congress.[7] The

[7] "There is no mention of Indian land in the committee reports, the debates or the directive statute; the Indians do not appear to have testified at the hearings; and in the plan considered by Congress there was no apparent necessity for the taking of Indian land." Note, 72 HARV. L. REV. 1372, 1373-4 (1959).

reservoir, its location, its size and form, and the many problems connected with locating it on any particular site were not the concern of Congress,[8] but rather were matters which remained to be worked out within the framework of the Federal Power Act.[9]

To construe such general legislation, either from its language or from its necessary implications, as constituting the specific consent required of Congress to the alienation of Indian lands is to pervert all standards of statutory construction and to blind oneself to the plain meaning and implication of clearly written language. Such a construction, moreover, does violence to the established rule that statutes affecting Indian tribes are to be interpreted, whenever possible, "in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and

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[8] The Solicitor General relies heavily (Pet., No. 911, pp. 15-16) upon a report of the Power Authority, dated January 28, 1957, as showing the nature of the Niagara Project. Aside from the fact that this document admittedly does not refer to the Tuscarora Nation or the Tuscarora Reservation, the report apparently also was not made a part of the record before any Congressional committee. The report, for example, is not listed as an exhibit in the table of contents and, as a study of the printed text reveals, is nowhere made a part of the official transcript of the hearings published by the Senate Committee on Public Works. Hearings before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st Sess., on S. 512 and S. 1037, dated April 10-13, 1957. The House Committee on Public Works did not hold any hearings during 1957 on bills relating to the Niagara Project. H. Rep. No. 862, 85th Cong., 1st Sess., p. 3.

[9] This was a statute which by its very generality permitted the licensee to test the situation and, if it discovered determined resistance or legal impediments to a proposed site, "to abandon the proposed undertaking and seek its water supplies in some other direction." *New York* v. *Pine*, 185 U.S. 93, 98 (1902).

good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).

The fact that the Court of Appeals for the Second Circuit concluded, contrary to the decision below, that Public Law 85-159 does constitute the necessary Congressional consent to the taking of Tuscarora land does not establish a live conflict worthy of this Court's resolution. The Second Circuit ruling on this issue was contrary to the statutory scheme of review of matters affecting licenses under the Federal Power Act and should never have been made. The ruling was entirely gratuitous, being outside the scope of the issues presented by the parties. In addition, a mere reading of the Second Circuit opinion discloses that the court simply assumed, but did not decide, the validity of the license. The court necessarily was limited, by virtue of the pending review proceedings in the District of Columbia court, to a determination that *if* the license were valid, the licensee then could condemn the land pursuant to the authority granted in Public Law 85-159. But the difficulty with this reasoning was that the validity of the license depended in part upon the interpretation to be accorded Public Law 85-159. And that was an issue solely within the jurisdiction of the District of Columbia court.

Indeed, as events have proved, the ruling of the Second Circuit as to Public Law 85-159 has become of no force or effect. By virtue of the express provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), the filing of the appeal in the District of Columbia court gave that tribunal "exclusive jurisdiction to affirm, modify or set aside" the license. See opinion of Mr. Justice Harlan on the stay application, *Tuscarora Nation of Indians* v. *Power Authority*, 79

Sup. Ct. 4, 6 (1958); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958). The very purpose of giving such exclusiveness to the jurisdiction of the court below was to avoid conflicting decisions in the courts of appeals and to give controlling force to the determination of the reviewing court. See Note, 72 HARV. L. REV. 1372, 1374 (1959). And because the court below has interpreted Public Law 85-159 in the necessary course of exercising its exclusive jurisdiction to determine the validity of the license, any contrary determination by the Second Circuit on issues within that exclusive jurisdiction is a nullity.

In short, the Power Authority cannot now rely on the Second Circuit's ruling on Public Law 85-159 to condemn the Tuscarora lands. The ruling of the court below has become controlling and decisive. There is thus no outstanding conflict of opinion for this Court to resolve.

Furthermore, even if a true conflict were in existence, this difference of opinion would not be worthy of review and resolution by this Court. In the first place, Public Law 85-159 relates to only one power project affecting one Indian reservation, so the question decided below cannot possibly arise in litigation involving other parties. Secondly, Public Law 85-159 directs that the license issued to the Power Authority shall be on the terms and conditions specified in the Federal Power Act, so that as noted hereinafter, regardless of the interpretation placed upon the 1957 statute, Tuscarora lands still are protected by Section 4(e), 16 U.S.C. § 797(e).

B. Issues Under the Federal Power Act

Petitioners herein have presented no valid reason why this Court should review the conclusion below that Tuscarora Reservation lands fall squarely within the scope of the protective proviso in Section 4(e) of the Federal Power Act. That conclusion follows inevitably from a proper reading of the word "reservation"—a word defined in Section 3(2) of the Act to include "tribal lands embraced within Indian reservations." As the court below observed, respondent's property "indubitably" comes within the usual meaning of that phrase.

Without any supporting statutory language, judicial precedent or administrative practice, petitioners contend that the term "reservation" encompasses only those Indian tribal lands in which the United States holds the fee or has some real property interest. Since the fee to the Tuscarora Reservation is held by the Tuscarora Nation, the petitioners assert that the lands may be taken without regard to the finding of consistency required by Section 4(e).[10]

The plain statutory words militate against such a result. Section 4(e) refers to "the public lands and

[10] Contrary to the Solicitor General's assertion (Pet., No. 911, p. 20), respondent never has accepted "the propriety and need for condemnation" or the lack of propriety in "an annual charge under Section 10(e)". Since the Tuscarora Reservation originally was purchased by the United States with tribal funds held in trust by the United States, the payment of an annual fee to the United States for the benefit of the Tuscarora Nation pursuant to Section 10(e) for any portion of respondent's lands used under a valid Commission license might very well be entirely appropriate. That question, however, has not been litigated and is not at issue in these proceedings since the court below held the Commission license invalid with respect to the Tuscarora Reservation.

reservations of the United States." The term "reservations of the United States" is in turn defined by Section 3(2) to include "national forests, *tribal lands embraced within Indian reservations;* military reservations, and other lands and *interests in land* owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." [Emphasis added.]

The phrase "tribal lands embraced within Indian reservations" by itself admits of no distinctions or limitations in terms of the possessor of the fee. Indeed, the historic concept of an Indian reservation always has included all varieties of land title.[11] Secondly, the statutory setting in which this crucial phrase occurs gives no indication that Congress was here referring only to those reservations in which the United States has some proprietary interest. Section 3(2) is not so constructed or punctuated as to convey the thought that the phrase "owned by the United States [etc.]" must modify the term "tribal lands [etc.]."[12]

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[11] A variety of tenures has marked the holding of reservations by Indian tribes. Among the tenures are (1) fee simple ownership of land by the Indian tribe, (2) equitable ownership of the land by the Indian tribe, with fee title in the United States, (3) leasehold interest in the land by the Indian tribe, (4) rights of reverter, and (5) easements. See *Federal Indian Law* 591-2 (Dept. of Interior, 1958).

[12] The major flaw in petitioners' argument is that, of necessity, it claims too much. In other words, the reading of Section 3(2) advanced by the petitioners would combine the phrases "tribal lands embraced within Indian reservations" and "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the

Lastly, Section 3(2), in reciting the various definitions of "reservation", speaks not only of *lands* owned by the United States, but also of *interests in lands* owned by the United States. In the instant case, of course, the United States owns an interest in the lands of the Tuscarora Reservation. By virtue of 25 U.S.C. § 177 and § 233, as confirmed by the uncontested rulings of the court below and the Second Circuit on this point, the United States possesses a restraint over the alienation of respondent's lands without federal consent. Such a restriction on alienation, coupled with the general guardianship relation of the United States to the Tuscarora Nation,[13] is a sufficient interest in the lands to enable the United States to sue to enforce the restriction. *Heckman* v. *United States*, 224 U.S. 413, 444-6 (1912). And that restriction and relationship make a sufficient property interest in these lands to bring the Tuscarora Reservation within the concept of "interests in lands owned by the United States."

More importantly, the restricted reading which the petitioners would give to the phrase "tribal lands embraced within Indian reservations" is contrary to 175 years of dealings between the Federal Government

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public land laws." Such a construction would virtually eliminate all Indian lands from the statutory definition of "reservations" since most Indian reservations, including the Warm Spring Reservation under consideration in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), were established by treaty or agreement with the United States rather than under the "public land laws."

[13] The Solicitor General urges (Pet., No. 911, p. 22) that the "measure of guardianship protection" owed by the Federal Government to the Tuscarora Nation is merely the payment of "just compensation" for tribal property. This kind offer of a right guaranteed to all by the Constitution is something less than the high standard of fair dealings arising out of the guardianship relation which Congress and the courts traditionally have demanded.

and Indian tribes. The courts uniformly have ruled that federal protections apply to all lands of tribes recognized by the United States whether or not the Indians' title is derived from the Government and whether or not the Government has a "proprietary interest." *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).[14] As stated by Judge Parker in *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417, 422 (C.A. 4, 1958):

> "The determinative fact is that the federal government has assumed towards them the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise without its consent."

No reason is advanced by petitioners why an exception to this uniform rule should be carved out of the

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[14] In Cohen, *Handbook of Federal Indian Law* (Govt. Print. Off., 4th ed., 1945), at p. 321, it is recited that "the decisions are uniform that a tribe holding land in fee simple is subject to exactly the same restraints upon alienation as any other tribe." Again at p. 309 it is noted that "even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state." The late Felix S. Cohen, the author of these statements, has been characterized by this Court as "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U.S. 1, 8 (1956). Neither petitioner cites a single case contrary to the proposition that lands owned by Indians in fee simple are accorded exactly the same protections against alienation as lands held in trust by the Federal Government.

Federal Power Act. Section 4(e) was plainly designed to protect Indian tribes in the possession and occupancy of their reservations, absent some specific intent by Congress to take away such protection, to the extent that any proposed license would be inconsistent with or interfere with the purposes for which the reservation was created. The whole purpose of that protection is in no way dependent upon the precise title arrangement of the reservation land. And nothing that this Court said or held in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), gives any support to the opposite conclusion.

But even if Section 4(e), or the definition of "reservations" in Section 3(2), were to be considered ambiguous, this Court repeatedly has ruled that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). See also *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). A corollary canon of statutory construction is that treaties with Indian tribes and laws affecting Indians must be liberally construed for the benefit and protection of the Indians. *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-5 (1942). In light of these principles of law, Section 4(e) of the Federal Power Act cannot be construed as failing to give the Tuscarora Nation the benefits of the uncontested finding by the Power Commission that the Power Authority's license is inconsistent with the purpose for which the Tuscarora Reservation was established.

So clear are the language and purpose of Section 4(e), as construed and applied to this case by the court below, that further review by this Court is unnecessary.

C. The Procedural Issues

Several additional issues raised by the petitioners are equally without importance for purposes of this Court's certiorari jurisdiction.

1. The Solicitor General complains (Pet., No. 911, pp. 22-24) that the court below erred in remanding the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." Quite plainly, however, the court below in no way invaded the area of discretion residing in the Commission. Having decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below properly directed that the license be amended in such a way as to eliminate all impact upon the reservation.

The court's ruling on the merits did not leave room for the exercise of discretion by the Commission on the inclusion of respondent's lands within the Niagara Project. The Solicitor General, therefore, cannot and does not suggest that a different order on remand in any way would change the ultimate disposition of this case with respect to the Tuscarora Reservation, the only property here involved. Similarly, there was no need for the court below in its order on remand expressly to permit the Commission to consider alternative or smaller reservoir sites. Those issues then were and still are pending before the Commission on the

application for an amended license filed by the Power Authority.

In short, there was nothing for the Commission to reconsider on remand in light of the narrow holding and direction of the Court of Appeals. This case thus is entirely unlike *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), where the lower court had tried to exercise an administrative function in its order.

2. The contention of the petitioner Power Authority (Pet., No. 921, pp. 8-9) that the court below erroneously permitted the question of Congressional consent to the taking of Tuscarora lands to be relitigated following the Second Circuit decision is wholly without merit. The principle of *res judicata* cannot conceivably apply to the proceedings below since the Commission was not a party to the Second Circuit case.[15] Moreover, the ruling of the Second Circuit on the question of Congressional consent is now pending before this Court on a motion for leave to file a petition for rehearing from the denial of certiorari. The Second Circuit ruling thus has not yet achieved complete finality in light of the special circumstances of this manifold litigation. And finally, this contention of the Power Authority completely ignores the statutory scheme of review established by the Federal Power Act wherein the court below—not the Second Circuit—has *exclusive* jurisdiction to decide all issues bearing upon the validity of the license. 16 U.S.C. § 825*l*(b);

[15] The Second Circuit, of course, also ventured no opinion on the basic issue decided below, the validity of the license issued by the Commission to the Power Authority with respect to the Tuscarora Reservation.

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958).

CONCLUSION

For the foregoing reasons, the petitions in both No. 911 and No. 921 should be denied. Respondent also calls the attention of the Court to the fact (see Pet., No. 911, p. 11, fn. 4) that the petitioner Power Authority has apparently abandoned its proposal to utilize Tuscarora Reservation lands for the reservoir and has filed an application with the Federal Power Commission for an amended license covering a redesigned reservoir entirely off Tuscarora Reservation lands. This application will result in making the present controversy entirely moot.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1952

FEDERAL POWER COMMISSION, *petitioner*,

v.

TUSCARORA INDIAN NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 911

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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1. Seeking to belittle the importance of this case, respondent asserts that the elimination of Indian lands from the proposed Niagara project reservoir will not seriously affect its capacity. The brief in opposition states that feasible alternative lands are available and that any contrary view is merely "the Solicitor General's speculation" or the Federal Power Commission's "sheer dicta" (Brief in Opposition, pp. 16–17 and n. 5). To clarify this point, the Commission hereby reaffirms its conclusion based upon the whole record, and the advice of its technical staff, that Indian lands are essential for the construction of a pump-storage reservoir of 60,000 acre-feet capacity, which in

turn is a requisite of a Niagara hydroelectric project having a dependable capacity of 1,800,000 kilowatts and thus utilizing "all of the United States share of the water of the Niagara River permitted to be used by international agreement" (Public Law 85–159).[1] We repeat that if the decision below stands there will definitely be a substantial reduction in the kilowatt capacity of the Niagara hydroelectric project.

As stated in our Petition, pp. 10, 11, removal of the reservoir from Indian lands would cut its storage capacity by half, to 30,000 acre-feet, and reduce the dependable kilowatt capacity of the project by one-sixth, to 1,500,000 kilowatts, a loss of 300,000 kilowatts. The Power Authority has proposed to raise the dikes of the resulting smaller reservoir, thereby attaining a capacity of 45,000 acre-feet. This will introduce technical problems, and the proposed amendment has not yet been passed upon by the Commission. In any event, even if approved, the proposed modified reservoir would still result in a loss of 150,000 kilowatt capacity from the project contemplated by Congress.

2. Respondent also asserts that the plans of the Power Authority for the Niagara project were never made part of the published record of any committee of Congress, implying that Congress was unaware of the details of the project (Brief in Opposition p. 19, n. 8). This is not so. The House and Senate Com-

[1] We have already pointed out that, when Congress directed full utilization of the Niagara waters, it clearly contemplated a project having a dependable capacity of 1,800,000 kilowatts (Pet. 15–16, and n. 5).

mittee reports refer explicitly to such plans (Pet. 16, n. 5). Furthermore, as the record below shows, copies of the 26th Annual Report of the Power Authority were mailed to the Senate Committee on Public Works and to the House Committee on Public Works on January 28, 1957 (T. 7004–7007, 8249). This report set forth the enlarged project including the pump-storage reservoir proposed after destruction of the Schoellkoff plant (Pet. 15). Additional copies of the 26th Annual Report of the Power Authority were furnished to members of the Subcommittee of the Senate Committee on Public Works during its hearings in April of 1957 on bills dealing with the Niagara development, S. 512 and S. 1037, 85th Cong., 1st Sess. (T. 7000). In response to a question by the Chairman of the Senate Subcommittee, a map on pages 40 and 41 of the 26th Annual Report showing the general location of the project works, including the pump-storage reservoir, was called to the attention of the Subcommittee (T. 7004). Each member of the Senate Subcommittee present at the hearing had a copy of this report and questions were asked with respect to it (T. 7001–7002, 7020). It was because of this background that the Second Circuit held that Congress must have contemplated the taking of Tuscarora lands and that, consequently, Public Law 85–159 constituted authority for condemning them independent of the Federal Power Act. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 891–892 (C.A. 2), certiorari

denied, 358 U.S. 841, motion for leave to file petition for rehearing pending, No. 384, October Term, 1958.[2]

For the reasons stated in the petition, and in this reply brief, we respectfully submit that the petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

JUNE 1959.

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[2] Respondent argues that the court below correctly held the term "reservation" in Section 4(e) of the Federal Power Act to include lands owned in fee by an Indian nation, notwithstanding the absence of any real property interest in the United States. It hedges this position somewhat with the statement that the Tuscarora lands in suit were originally purchased by the United States with tribal funds held in trust by the United States (Brief in Opposition, p. 22, n. 10). However, the record will show, as the Second Circuit has stated, that the Tuscaroras acquired the lands "by purchase and not as a grant from the United States", with the assistance only of "the good offices of the Secretary of War." *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 887.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. [redacted] 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term 1958

No. 921

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,
v.
TUSCARORA INDIAN NATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

As pointed out in the memorandum submitted by the Solicitor General in reply to the brief filed by respondent in opposition both to this petition and to the petition in No. 911, respondent is wrong in contending that the controversy is moot. It is not moot because, pursuant to an order of the United States District Court for the Western District of New York, based on the holding of the Second Circuit Court of Appeals in *Tuscarora Nation* v. *Power Authority*, 257 F. (2d) 885 (1958), cert. denied 358 U. S. 841, the Power Authority has taken possession of 85.6 acres of the reservation and has built transmission lines which are already in use. These lines are not referred to in respondent's brief,

although our petition (page 9) pointed out the legal dilemma with respect to them which we now ask this Court to resolve.

The case is not moot for a further reason—if no Indian land is available as a matter of law for the storage reservoir, the capacity of the project will be substantially reduced.

We desire to supplement the Solicitor General's memorandum by calling the Court's attention to the following facts.

1. In an effort to give the impression that no Indians ever testified before Committees of Congress in the hearings leading up to the passage of Public Law 85-159 (Act of August 21, 1957; 16 U. S. C. §§ 836, 836a; 71 Stat. 401) authorizing the Niagara Project, respondent in a footnote on page 18 of its brief quotes a Harvard Law Review article which states that the Indians did not appear to have testified at the hearings and that in the plan considered by Congress there was no apparent necessity for the taking of Indian land. (Note, Harv. L. Rev. 1372, 1373-4 (1959))

The House of Representatives did not hold hearings in 1957, but did issue a report that year (H.R. No. 862, 85th Cong. 1st Sess.) on the basis of which Public Law 85-159 was passed. This report referred to the hearings held by the Committee in the 81st, 82nd, 83rd and 84th Congresses and said:

> "In view of all of the foregoing circumstances, including the 7-year history of the legislation, the extent of the hearings previously held . . . further public hearings were not required in the public interest, and would be productive of only further delay aggravating the existing emergency situation."

A representative of the Seneca Indians testified at the hearings in the 82nd Congress and claimed that the Indians owned land vitally needed for the project and objected to its being taken. A member of the House Committee addressed the witness as follows:

"MR. ANGELL. I gather from what you are saying that you are interested in protecting the rights of the Indians. I did not hear your testimony.

"I come from Portland, Oreg. We have a large number of reservations, Indian lands, and rights under treaties, particularly on the Columbia River. The way it is handled out there, the Government takes any of their property, which it can do, of course under condemnation. It can condemn the property owned by me or the Indians as far as that goes, but it must compensate the person who owns the property. The Indians have recourse against the Government for its value if their property is taken." (Hearings before Subcommittee of House Committee on Public Works, Sept. 19-21, 1951, Pub. Doc. No. 82-8, p. 166)

At the House Public Works Committee hearing in 1956 a witness testified that the Power Authority could condemn whatever land was needed for the project regardless of its ownership. (Hearings before Subcommittee of House Committee on Public Works, June 28, 1956, Pub. Doc. No. 84-22, pp. 23-24)

The Senate Committee on Public Works did hold a hearing in 1957 and no Indian witness appeared at the hearing, although the fact that Tuscarora land was needed for the reservoir had been open and notorious for several months, had been brought to the attention of the Tuscarora, and actual negotiations were being carried on with them. (T. 6404-6, 7938-9)

A Power Authority brochure introduced in evidence at the hearing and examined by each member of the Committee showed the project's proposed storage reservoir in a location which included Tuscarora land, although ownership of none of the land in the project was indicated (T. 7000-2, 7612-3, 7884 *et seq.*).

In a hearing held by the Senate Public Works Committee in the 82nd Congress, a Seneca representative gave the same type of testimony as he gave before the House Com-

mittee. (Hearings before Subcommittee of Senate Committee on Public Works August 21-22, 1951, pp. 182-188.)

2. In footnote 12 on page 23 of its brief, respondent seeks to give the impression that in Section 3(2) of the Federal Power Act the phrase "other lands and interests in lands owned by the United States, and withdrawn, reserved or withheld from private appropriation or disposal under the public land laws" refers only to lands which are withdrawn by virtue of some provision of the public land laws. Actually, the phrase refers to public lands withdrawn, reserved or withheld by statute, by treaty or by executive order and which, no matter how withdrawn, cannot be appropriated or disposed of to private individuals under the procedures set up in the public land laws.

3. Respondent attempts to answer the Power Authority's contention that the judgment of the Second Circuit Court of Appeals in *Tuscarora Nation of Indians* v. *Power Authority, supra*, is binding on Tuscarora—which selected the Second Circuit as it first forum—and should have been honored by the District of Columbia Circuit—in which it elected to file its review petition although it could have filed it in the Second Circuit. It says on page 20 that "the filing of the appeal in the District of Columbia Court gave that tribunal 'exclusive jurisdiction to affirm, modify or set aside' the license". Actually, Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b) does not give exclusive jurisdiction to the Court in which a review proceeding is brought until the record is filed with it by the Federal Power Commission, and in this case the record was not filed until after the District Court judgment had been entered in the Second Circuit action. Since the review petition in this case was filed prior to the amendment of Section 313(b) by Public Law 85-791 on August 28, 1958, the District of Columbia Circuit got no jurisdiction, let alone exclusive jurisdiction, prior to the filing of the record.

Respondent contends that the Second Circuit judgment was not binding on it because the Federal Power Commission

was not a party there. But had the Second Circuit judgment been adverse to the Power Authority, the Federal Power Commission would have been effectively bound even though it was not a party because its licensee would have been unable to condemn Tuscarora land and by the terms of Public Law 85-159 the Commission could not issue a license for the Niagara Project to anyone else. In any event, the Second Circuit judgment having been adverse to Tuscarora, it was bound by it in any other litigation involving the same issue regardless of identity of other parties or "mutuality".

Bruszewski v. *United States*, 181 F. 2d 419 (3d. Cir. 1950);
Israel v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956);
Coca Cola v. *Pepsi Cola Co.*, 6 W. W. Harr. (36 Del.) 124, 172 A. 260 (1934).

Conclusion

For the foregoing reasons and for those set forth in the petition herein, as well as the petition and memorandum submitted by the Solicitor General in No. 911, this petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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June 19, 1959.

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OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals of November 14, 1958 (R. 422–432)[2] is reported at 265 F. 2d 338. The court's order of March 24, 1959 (R. 532–533) is set out at the end of the opinion, 265 F. 2d at 344.

JURISDICTION

The order of the Court of Appeals, entered on November 14, 1958, remanded the case to the Federal

[1] This is a companion case to *Power Authority of the State of New York* v. *Tuscarora Indian Nation*, No. 66, this Term.

[2] The transcript of record consists of two volumes—one volume cited "R. ——", contains 534 pages of testimony, opinions and other proceedings; the second volume, cited "R. Ex. ——", contains 243 pages of exhibits.

Power Commission for further proceedings, retaining jurisdiction in the court below (R. 432–433). Upon the Commission's report, the court entered its judgment on March 24, 1959 (R. 532–533). The petition for a writ of certiorari, filed May 11, 1959, was granted on June 22, 1959 (R. 533). The jurisdiction of this Court rests upon Section 313(b) of the Federal Power Act and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In Public Law 85–159, approved August 21, 1957, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the contruction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," subject to seven specified conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act"; in the event of any conflict, the provisions of Public Law 85–159 were to govern. By order of January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for the Niagara Project, including a pump-storage reservoir of 60,000 acre-feet capacity. Approximately one-half of the pump-storage reservoir would be located on lands of the respondent Tuscarora Indian Nation.

The questions presented are:

1. Whether Congress, in specifically authorizing the Niagara Project in 1957, granted the Power Authority of the State of New York the right to take lands of the

Tuscarora Indians needed for this purpose, without regard to any otherwise applicable provisions of the Federal Power Act limiting the use of Indian lands.

2. Assuming that the general limitations of the Federal Power Act are applicable, whether the Tuscarora lands sought to be used for the pump-storage reservoir constitute a "reservation" within the meaning of Section 4(e) and Section 3(2) of the Federal Power Act, so that the Niagara Project license within such areas must be based upon a finding that it will not interfere or be inconsistent with the purpose of the reservation.

3. Whether the Court of Appeals has exceeded its power and usurped an administrative function by directing the Federal Power Commission to amend its licensing order so as to exclude Tuscarora lands, instead of remanding the case to the Commission for its consideration of any further steps required in the public interest in the light of the decision of the Court of Appeals.

STATUTES INVOLVED

The provisions of Public Law 85–159, 71 Stat. 401, approved August 21, 1957, and pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, are set forth in the Appendix, *infra*, pp. 76–82.

STATEMENT

Respondent Tuscarora Indian Nation filed a petition in the court below to review the Federal Power Commission's order issuing a license to the Power Authority of the State of New York for the con-

struction and operation of a hydroelectric project on the Niagara River, including 1,383 acres of Tuscarora land. The Court of Appeals, after some intermediate proceedings, sustained the objections of the Tuscaroras. The pertinent facts and proceedings are as follows:

1. *The Licensed Project.* (*a*) Between Lake Erie and Lake Ontario, the 36-mile Niagara River drops 326 feet. About half of the drop occurs at Niagara Falls and an additional 140 feet in the rapids immediately above and below the Falls. The mean flow of the Niagara River is about 200,000 cubic feet per second and because of the immense storage capacity of the upper Great Lakes, whose surplus water the River carries seaward, its flow is remarkably steady. The "head" created by this concentration of falls and rapids in a relatively short distance, combined with the large and steady flow of the river and its proximity to markets, makes the Niagara site one of the world's largest and most economical for hydroelectric development. The water available has a potential of more than twice the power capacity of the St. Lawrence site recently developed downstream.

The licensed Project proposes to utilize 314 feet of head for the production of power at Lewiston, New York. It will be the largest hydroelectric facility in the United States, costing more than $700,000,000. Its installed capacity will be 2,190,000 kilowatts, of which 1,800,000 kilowatts will be firm power available 17 hours daily, with an annual production of 13,000,000,000 kilowatt hours. The Project consists primarily of (1)

an intake structure about three miles above the Falls near Connors Island, (2) a cut-and-cover conduit system which will carry water from the intake about 21,500 feet across the city and town of Niagara Falls to the generating facilities below the Falls in Lewiston, (3) the Lewiston generating plant, (4) the Tuscarora pumping-generating plant east of the Lewiston plant and connected with it by an open canal, (5) the Tuscarora pump-storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 3,000 acres including 1,383 acres of the Tuscarora Indian Reservation (R. 392, 401–402, 417–418.).

The pump-storage reservoir was planned to maintain the project's dependable capacity, in view of the fluctuations in demand and in available water. The peak demand for power occurs during the day on weekdays. There is an unused excess of flow at night (and on weekends) and the disparity is particularly acute during the tourist season when the permissible diversion of water (under the treaty with Canada described below) is much greater at night than during the day. The solution provided is that the water not needed for power at night and on weekends will be pumped up into the reservoir on the Niagara escarpment and stored for release at the peak day hours, when the pumps (operating in reverse) serve as generators. A 60,000 acre-feet reservoir has been found essential to attain a dependable capacity of 1,800,000 kilowatts. R. 3, 224–227, 230–231, 394, 487–488; R. Ex. 4, 5, 6. See pp. 33–36, 43, *infra*.

(*b*) The licensed development was made possible by a 1950 treaty with Canada. Under the prior 1909 Boundary Waters Treaty, diversions from the Niagara River were limited to 36,000 cubic feet per second by Canada and 20,000 cubic feet by the United States. Treaty Series 548, 36 Stat. 2448. The United States share of this treaty amount was utilized in the Schoellkopf plant of the Niagara Mohawk Power Corporation, with an installed capacity of 360,000 kilowatts, under license from the Federal Power Commission issued in 1921, to expire in 1971.[3]

The 1950 treaty with Canada recognized the area's need for low-cost power, and greatly enlarged the permissible diversions "to avoid a continuing waste of a great natural resource and to make it possible for the United States of America and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes * * *." The treaty provides for a flow of 100,000 cubic feet per second over Niagara Falls during specified daytime and early night hours of the tourist season (April 1 to October 31) for purposes of the scenic attraction, and a flow of 50,000

[3] Temporary additional diversions of 12,500 cubic feet per second were authorized for emergency purposes by agreements with Canada in 1941. Executive Agreement Series 209, 223, 55 Stat. 1276, 1380. The additional diversions were used by Niagara Mohawk in the above-mentioned Schoellkopf plant and in the Adams plant, an older facility with 80,000 kilowatt capacity. Abandonment of the obsolete Adams plant was contemplated in all the Niagara development plans.

cubic feet at other times. All excess water [4] is divided equally between the United States and Canada for power purposes. The Senate ratified the treaty with the reservation that no development on the United States side would be undertaken without specific authorization by Act of Congress. 1 U.S.T. 694.

(c) Not until August 21, 1957, did Congress specifically authorize the Niagara Project.[5] The seven-year delay was occasioned by prolonged controversy over public or private development, marketing preferences and other matters of power policy, carried on through eight sessions of committee hearings and more than 30 proposed bills in the 81st to the 85th Congresses.[6]

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[4] The excess amount available for power is estimated to fluctuate between 44,000 to 210,000 cubic feet per second, depending on the river flow, the time of year, and the time of day. S. Rept. 539, 85th Cong., 1st sess., p. 4.

[5] Before Congress passed its specific authorization in Public Law 85–159, the Power Authority filed an application for a license under the Federal Power Act. The Commission dismissed this initial application because of the reservation in the 1950 Treaty. The order dismissing the application was reversed and remanded by the Court of Appeals for the District of Columbia Circuit, which held that the treaty reservation was ineffective to restrict the Commission's power to license the project under the Power Act. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A.D.C.). This Court vacated the judgment of the Court of Appeals as moot after enactment of Public Law 85–159. *American Public Power Assoc., et al.* v. *Power Authority of New York*, 355 U.S. 64.

[6] Hearings were held before the Senate Committee on Public Works, or a subcommittee, in the first sessions of the 85th Congress, 84th Congress, 83d Congress and 82d Congress; before the House Committee on Public Works in the first and second

However, as the Congressional reports reiterated, there was throughout "no controversy as to the most desirable engineering plan of development." S. Rept. 539, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 7; H. Rept. 2635, 84th Cong., 2d sess., pp. 11–12; S. Rept. 2501, 83d Cong., 2d sess., p. 6; H. Rept. 713, 83d Cong., 1st sess., p. 8; 102 Cong. Rec. 8074, 8080, 8238; 99 Cong. Rec. 8386; see S. Doc. 113, 84th Cong., 2d sess., p. 11. The detailed plans were first set forth in the 1949 report of the Commission's Bureau of Power, which served as the basis for the treaty negotiations and for initial congressional consideration.[7] As requested in a resolution adopted June 5, 1951, by the Senate Committee on Public Works, the U.S. Army Corps of Engineers made further studies "to determine the most feasible general

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sessions of the 84th Congress, and in the first sessions of the 82d Congress and 81st Congress. Joint hearings were held by the House Committee and a subcommittee of the Senate Committee in the 83d Congress, 1st session. The committee reports on the bill which was enacted were S. Rept. 539, 85th Cong., 1st sess.; H. Rept. 862, 85th Cong., 1st sess. Prior reports on other bills were S. Rept. 1408, 84th Cong., 2d sess.; H. Rept. 2635, 84th Cong., 2d sess.; S. Rept. 2501, 83d Cong., 2d sess.; H. Rept. 713, 83d Cong., 1st sess.

[7] Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949). For the relation of this report to the 1950 treaty, see S. Exec. Rept. 11, 81st Cong., 2d sess., p. 6; Message from the President, Senate Exec. Doc. N, 81st Cong., 2d sess., pp. 2, 3. The early bills uniformly required development in substantial accordance with the Bureau of Power report. *E.g.*, H.R. 8343—81st Congress; S. 517, S. 1963, S. 2021, H.R. 1642, H.R. 3146, H.R. 5099—82d Congress; H.R. 2289—83d Congress, quoted in the hearings of those Congresses, fn. 6, *supra*.

plans"[8] for utilization of the diversions authorized by the 1950 treaty, and submitted its report, printed as S. Doc. 113, 84th Cong., 2d sess.[9] Other studies were made by the New York State Power Authority and the Niagara Mohawk Power Corporation.

(*d*) On June 7, 1956, a rock slide destroyed a large part of the Schoellkopf plant of the Niagara Mohawk Power Corporation, which had been using 23,000 cubic feet of water per second from the Niagara River (including the temporary diversions—p. 6, *supra*). The urgent need for power resulting from the Schoellkopf disaster led to speedy compromise on all the issues which had delayed legislation. S. Rept. 539, 85th Cong., 1st sess., pp. 1–3, 6–9; H. Rept. 862, 85th Cong., 1st sess., pp. 1–3, 7–9; H. Rept. 2635, 84th Cong., 2d sess., p. 8; 103 Cong. Rec. 13194–13197, 14447–14448. In addition, it became evident that, instead of rebuilding the Schoellkopf plant, the entire diversion permitted in the United States could and should be utilized by the project to be licensed at Lewiston. Accordingly, the Project plans—which had previously assumed that 20,000 cubic feet per second were reserved for the Schoellkopf plant—underwent their last major revision, at the hands of the New York Power Authority. The installed capacity was raised to 2,190,000, of which 1,800,000 was firm dependable power on a 17-hour daily basis. The pump-storage and pumping-generating facilities required were also modified—and the contemplated reservoir was

[8] The resolution is quoted at S. Doc. 113, 84th Cong., 2d sess., p. 2.

[9] See S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., p. 5.

enlarged to 60,000 acre-feet. S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., pp. 5–7; Exhibits 13, 191, 218, R. Ex. 4–6, 42–44, 132.

(*e*) By Public Law 85–159, approved August 21, 1957, 71 Stat. 401, pp. 76–79, *infra*, Congress directed the Federal Power Commission to issue a license to the New York State Power Authority "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement."

Public Law 85–159 also instructed the Commission to include seven specific "licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act." The prescribed conditions settled all the previously disputed points. Cooperatives and municipalities were given preference for 50 percent of the power production and 20 percent of this amount was to be available in neighboring states. Niagara Mohawk was assured 445,000 kilowatts for a designated period to supply the customers of its Schoellkopf plant in exchange for relinquishment of its license. The New York Authority was given power to construct independent transmission lines for reaching its preference customers and to control the resale rates of distributors purchasing from it. The project was to bear the United States share of the costs of remedial works in the river and (up to a designated maximum) the costs of a scenic drive and park. Finally, the Act stated that the license was to be granted in conformance with the Commission's

Rules of Practice and Procedure but that, in the event of conflict, the provisions of the Act were to control.

(*f*) Accordingly, on January 30, 1958, the Commission issued a license to the Power Authority for the Niagara Project (Project No. 2216), including the works and storage reservoir described, *supra*, pp. 4–5 (R. 391–410). Disposing of the only significant technical question, the Commission selected a cut-and-cover conduit system, instead of tunnels or open canal, to carry the water through the towns (R. 395–399, 401). As to the proposed location of the pump-storage reservoir, although the New York Power Authority had not been permitted to survey Indian lands, it was estimated at the time of the first hearing before the Commission on the application that the reservoir would cover 2,800 acres and would utilize approximately 1,000 acres of lands of the Tuscarora Indian Nation. The Tuscarora Indian Nation objected to the use of any of its lands for reservoir purposes and the Town of Lewiston objected to the use of about 720 acres which it had planned to develop (R. 394–395).

In the decision issuing the license, the Commission found that a reservoir of the proposed capacity (60,000 acre-feet) was required to utilize properly the water resources involved. The town's request was refused. The Commission did not initially pass upon the Tuscaroras' objections, since it assumed that additional lands in the area would be available for reservoir purposes in the event the New York Power Authority would be unable to acquire the Indian lands (R. 394–395). However, in its order of March 21, 1958, denying the application of the Tuscarora Indian

Nation for rehearing, the Commission specifically found that the best location of the reservoir would require approximately 1,000 acres of land owned by the Tuscarora Indian Nation. It overruled the Tuscaroras' objections, holding that the lands involved did not constitute a "reservation" within the meaning of Sections 3(2) and 4(e) of the Federal Power Act (R. 412–414). On May 5, 1958, the Commission approved the Power Authority's Exhibit J to the license, a map showing the location of the project works, including the reservoir situated in part upon the Tuscarora Indian Reservation (Exhibits J, 167, R. 415-418, R. Ex. 23).

2. *The Tuscarora Indian Reservation.* (*a*) The Tuscarora Reservation occupies 6,249 acres in the township of Lewiston, New York (R. 488; Exhibits 189, 231, R. Ex. 31, 157), with a population of 944 as of April 1957 (R. 176). There are, at present, about 566 enrolled members of the Tuscarora Nation, of whom 413 live on the reservation (R. 197–198). The hundreds of additional residents of the reservation consist of Indians of other tribes and non-Indians who lease homes or reside in trailer camps (R. 54–55, 160-162, 176–177, 183, 191–192, 198). Except for a community house-gymnasium, forest and swamp areas and one farm belonging to the Nation, the reservation is allocated to individual members who may sell or transfer to other members, or lease to non-members, and whose lands descend by intestacy or by will (R. 52–58, 195–196, 198–199, 204, 370–377; Exhibit 235, R. Ex. 207–208, 212–213).

On the land sought to be taken for the storage reservoir of the Niagara Project (1,383 acres, or about one-fifth the reservation), there are 37 dwellings occupied by about 125 persons, one substantial barn, four other barns, small sheds and greenhouses (R. 72, 73, 88–89, 159, 488). Chief Harry Patterson farms 630 acres and he and his son are the only full-time farmers in the reservoir area (R. 75–77, 80, 88). There are also five other farms and various home gardens in the 1,383 acres (R. 89–90). The land, homes, and other improvements in the area were appraised at $980,000 (R. 71–74).

(*b*) The 1,383 acres sought for the reservoir are part of a parcel of 4,329 acres which the Tuscaroras purchased in the first decade of the 19th century from the Holland Land Company, using the proceeds from sale of the tribe's former lands in North Carolina to enlarge their holdings in Western New York, to which they had moved.[10]

As contemporaneous documents establish, the Tuscaroras requested and obtained the assistance of Sec-

[10] The lands thus purchased are shown as parcel C on Exhibit 231, R. Ex. 157, R. 483. Parcels designated A and B, 640 acres and 1280 acres respectively, were acquired by the Tuscaroras in 1799 by cession from the Holland Land Company. In the Treaty of Big Tree in 1797, the Land Company (through Robert Morris) acquired a large tract in Western New York from the Senecas, excepting certain reservations (R. 311–315, 317–320). The Tuscaroras residing in the area were not mentioned, apparently by inadvertence, and the Land Company thereafter agreed to cede first one square mile, then an additional two square miles to the use of the Nation. These were parcels A and B. Exhibits 232 A–E, 235, R. Ex. 165–170, 209, 211; R. 319–324.

retary of War Dearborn and persons appointed by him in North Carolina and New York (Exhibits 232 F-P, 244-248, R. Ex. 171-187, 223-230; R. 297-303). Since the North Carolina proceeds were being paid in installments, the Secretary was asked to act as escrowee—he was to receive the funds, hold them in the Bank of the United States, and make payments to the Holland Land Company (Exhibits 232 K, Q, R. Ex. 178-180, 188; R. 300, 303-304), and to hold the New York lands in trust until the payments were concluded (Exhibits 232 M, N, O, Q, R. Ex. 182-186, 188; R. 301-304). In 1804, upon its receipt of the first payment, the Holland Land Company conveyed the parcel to the Secretary of War "in Trust for the Tuscarora Nation of Indians" for the sole purpose of conveying the land to such persons as the Nation shall direct and appoint (Exhibit 232 S, R. Ex. 190-195; R. 304-305). Thereafter, some installment payments were handled by the Secretary (Exhibit 232 R, R. Ex. 189) but others were made directly to the Land Company by the Secretary's agent in North Carolina (R. 310-311, 336). Upon completion of the payments, in 1809, the Secretary transferred the land in fee simple to the Tuscarora Nation, which continues to hold such title (Exhibits 232 T-U, 235, R. Ex. 196-200, 209, 211; R. 305-307). As testified, the Tuscarora reservation area was created by this purchase transaction and not by any treaty, Act of Con-

gress or Executive Order (R. 354; Exhibit 250, R. Ex. 234–238).[11]

(*c*) Early in 1957, a representative of the New York Power Authority contacted members of the Tuscarora Nation concerning the reservoir area. He engaged in conversations, mailed to them the Power Authority's 26th Annual Report containing the outlines of the revised plans for the enlarged Niagara Project (p. 9, *supra;* Exhibit 191, R. Ex. 41–44), and specifically communicated the fact that, according to engineering studies, "a portion of the Tuscarora Reservation falls within the projected limits of the Storage Reservoir" (Exhibits 192, 193, R. Ex. 45–46; R. 110–112).[12] At a general tribal council meeting in March 1957, the Power Authority official requested permission to survey lands within the reservation. The request was refused (Exhibits 186, 193, R. Ex. 27–28, 46; R. 112). Further negotiations ensued (R. 113–114). At a council meeting one year later, in

[11] The reference in Indian treaties of 1784, 1789 and 1794 to the Tuscaroras clearly did not involve parcels A, B, and C in Western New York but referred to other areas in the central and eastern portions of the State in which portions of the tribe were then residing (R. 342–351).

[12] Latham, the Power Authority's resident engineer, first contacted Clinton Rickard, on the advice of a former mayor of Niagara Falls that he was a responsible member of the tribe. Rickard was not, however, a member of the tribal chiefs council (R. 124–125). In February 1957, on Rickard's advice, Latham contacted Hamilton Mt. Pleasant, chairman of the tribes' general council, to arrange the council meeting (Ex. 186, R. Ex. 27; R. 112). The letter of confirmation to Mt. Pleasant contained the quoted statement concerning the reservoir's location (Exhibit 193, R. Ex. 46).

May 1958, the Power Authority offered the Tuscaroras for the reservoir area about $1,100 per acre, plus moving, replacing or payment for houses, construction of a new community center, sale of cheap power from the Niagara development and employment of Tuscaroras on the development. This offer amounted to a proposed expenditure of about $2,400,000, including $1,500,000 for the 1,383 acres needed. It was rejected by the Tuscaroras but has never been withdrawn (R. 115–117, 120–121, 124, 148, 152, 155).

3. *Proceedings for Review of the License.* (*a*) On May 16, 1958, the respondent Tuscarora Indian Nation filed a petition for review in the court below challenging the license for the Niagara Project insofar as it sought to authorize the taking of Tuscarora lands (R. 419–422).

The Court of Appeals entered its opinion and interim judgment on November 14, 1958 (R. 422–432). It held, first, that the Tuscarora lands were protected by the federal statutes restraining alienation of Indian lands, citing 25 U.S.C. 177, 233, and that, therefore, "the consent of the United States must be found in some manner" (R. 423–424). The court then ruled that Public Law 85–159 did not constitute Congressional consent or authorization for the taking of the Tuscarora Indian lands for the Niagara Project. The court stated that Congress was aware only of the general location of the project works, not of the need for Indian lands or even, indeed, of any provision for the storage of water, and the Act was limited to designation of the licensee, the scope of the license, and seven licensing conditions. Since Congress did not

specify the project works or other matters, the power of the licensee to take the Tuscarora lands was, in the court's opinion, to be governed by the terms of the Federal Power Act (R. 425–428).

Turning to the authority available under the Federal Power Act, the Court of Appeals held that these Indian lands constitute a "reservation" of the United States within the meaning of Section 4(e) of the Federal Power Act (App., *infra*, pp. 80–81), and that the first proviso of Section 4(e) requires a finding by the Commission that the license will not interfere or be inconsistent with the purposes for which the Tuscarora Indian Reservation was created or acquired, as a prerequisite to the validity of a license authorizing their condemnation. This was so notwithstanding that the Tuscaroras had acquired the lands by purchase in fee simple and that the only interest of the United States was in its guardianship over Indian lands (R. 428–431). Accordingly, the court remanded the case to the Commission to explore the possibility of making the finding required by Section 4(e), expressly retaining jurisdiction pending receipt of the Commission's report (R. 431–433).

(*b*) The Commission held extensive hearings pursuant to the remand, exploring not only the possibility of making the required finding but also the possibility of removing the pump-storage reservoir from Indian lands. On February 2, 1959, the Commission found that the license, insofar as it includes lands of the Tuscarora Indian Nation, will interfere and be inconsistent with the purpose for which the Tuscarora reservation was created or acquired; two Commis-

sioners dissented on this point (R. 486–494). But the Commission also found from the whole record that a pump-storage reservoir with usable storage capacity of 60,000 acre-feet is essential to the utilization of the United States share of the water resources, as required by Public Law 85–159. The Commission pointed out that severe community disruption, unreasonable expense, and substantial delay would be caused by the flooding of part of the Town of Lewiston and, absent any feasible alternative, declared that removal of the reservoir from Indian lands would reduce storage capacity to 30,000 acre-feet, and result in a loss of one-sixth the dependable kilowatt capacity of the project (R. 487–488).

(*c*) The Commission's findings of February 2, and its order of February 25, 1959, denying the application of the Power Authority for rehearing (R. 506–512), were transmitted to the Court of Appeals. Upon various motions of the parties, the court declined to reconsider its earlier opinion and entered its final order and judgment on March 24, 1959 (R. 531–533). It approved the license except in so far as it would authorize the condemnation of Tuscarora lands for reservoir purposes, and remanded the case to the Commission with instructions to amend the licensing order so as to exclude specifically any such condemnation power (R. 533).[13]

[13] Before the decision below, the Court of Appeals for the Second Circuit ruled upon some of the same issues in a suit by the Tuscarora Nation to enjoin the New York Power Authority from proceeding with condemnation of their lands. On July 24, 1958, the Second Circuit held, first, that the federal restraints upon alienation of Indian lands applied to the

SUMMARY OF ARGUMENT

I

In the Niagara Development Act of 1957 (Public Law 85–159), Congress prescribed "a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159, p. 76, *infra*. The judgment below—eliminating Tuscarora lands from the Project's pump-storage reservoir—would frustrate this statutory objective and would substantially reduce the output and scope of the Niagara Project. The Court of Appeals relied upon the proviso of Section 4(e) of the Federal Power Act governing the taking of "reservations" for licensed projects. We submit that any such application of the Power Act at Niagara was necessarily superseded by Congress in Public Law 85–159.

A. 1. In the first place, contrary to the belief of the Court of Appeals, Congress clearly comprehended the whole project works within its authorization (in

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Tuscaroras; second, that the power of the United States to take Indian land by eminent domain was not affected; third, that in the Niagara Project Act Congress impliedly authorized the taking of the Tuscarora land, inferrable from the size of the project, the contemplated need for a storage reservoir, and the proximity of the lands. The Second Circuit therefore explicitly affirmed the Authority's right to exercise eminent domain. It also held that the Power Authority had to condemn through a federal or state court procedure, instead of a summary taking, and to that extent granted relief to the Tuscaroras. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, certiorari denied, 358 U.S. 841.

Public Law 85–159) of a power development utilizing "all" the waters available, and particularly contemplated the pump-storage reservoir and the extent of dependable capacity thwarted by the decision below. The project works had been agreed upon by all interested parties and were repeatedly described in the Congressional committees and on the floor of Congress during the seven years leading up to the 1957 Act. At all times, these plans included a pump-storage reservoir east of the main Lewiston plant, as an indispensable feature to maintain a high-load dependable capacity. Up to 1956, the project plans were based upon partial utilization of the treaty waters, the rest being reserved for the then existing Schoellkopf plant, and the proposals for the reservoir, located between Military Road and the Tuscarora Indian Reservation, varied from 22,000 to 41,000 acre-feet. The collapse of the Schoellkopf plant in June 1956 made "all of the United States share" available for the Niagara Project. In 1957, Congress passed Public Law 85–159 with knowledge that the Niagara Project's capacity was being increased to 2,190,000 kilowatts installed, of which 1,800,000 kilowatts would be dependable power on a 17-hour daily basis, and that this larger dependable capacity would require a larger reservoir—with 60,000 acre-feet storage. It is this larger reservoir which necessitates 1,383 acres of Tuscarora land.

2. Moreover, in Public Law 85–159, Congress clearly set aside any provision of the Federal Power Act which might restrict a development of this contemplated size. The 1957 Act represents a legislative

determination of the broadest possible scope. Congress selected a licensee, the New York Power Authority, and resolved all issues of power marketing policy and allocation of costs. It also foresaw all essential engineering elements required for full utilization of the available Niagara water.

The actual issuance of the license was left to the Federal Power Commission under the Federal Power Act. However, supersession *pro tanto* of the Power Act was plainly intended, and such supersession would automatically result from inconsistencies between the Power Act and various provisions in Public Law 85–159—of which Congress was aware. Indeed, Section 2 of Public Law 85–159 explicitly provided, with respect to the Power Act, that "in the event of any conflict, the provisions of this Act shall govern * * *."

B. The proceedings before the Federal Power Commission have shown that the proviso in Section 4(e) of the Power Act, relied upon below, is in unavoidable conflict with the Niagara Project authorized in Public Law 85–159. The Commission found, first, that the Power Act proviso, if applicable, would not permit the taking of the Tuscarora lands. The second critical fact is that a 60,000 acre-feet reservoir is indispensable to a project with 1,800,000 kilowatts dependable capacity. Third, exhaustive studies of all alternative locations established that 1,383 acres of Tuscarora lands are indispensable to a reservoir with storage capacity of 60,000 acre-feet. The record shows, and the Commission has concluded, that no real alternative exists to the project as licensed. Elimination of the Tuscarora lands would compel use of a smaller reservoir and

would cause a possible loss of 300,000 kilowatts of dependable capacity—or, if raising the dikes proves feasible, a loss of 150,000 kilowatts of dependable capacity.

Accordingly, since the Section 4(e) proviso (if applicable) would conflict with full utilization of the Niagara waters, it was superseded by Public Law 85–159. An alternative ground for sustaining the licensed Project was advanced by the Second Circuit, which ruled that Congress had impliedly sanctioned the use of Indian lands; the court drew this conclusion from the size of the Project, the need for a large reservoir, and the proximity of Indian lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 893–894, certiorari denied, 358 U.S. 841. The presumed Congressional knowledge of the Tuscarora location is also buttressed by published maps, and by references in the legislative history of the 1957 Act.

C. Finally, there is nothing in the law applicable generally to Indian lands which militates against this result. Even when treaty obligations are being overridden, this Court has found sufficient Congressional authorization for the condemnation of Indian lands (not expressly designated) from two factors amply demonstrable here—the necessity to use Indian lands for a project specifically authorized by Congress, or the presumption that Congress knew of Indian lands in the vicinity. *E.g., Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*, 160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118. The requirements here are

even less stringent since the Tuscarora reservation was created by the tribe's purchase of lands and is not protected by treaty. As long as the conditions of any applicable federal legislation are satisfied, there is full authority to take Tuscarora lands.

II

Even if the Federal Power Act is wholly applicable, we submit that the Tuscarora lands, fully owned in fee by the tribe, do not constitute a "reservation" within Section 4(e) of that Act and hence may be condemned like other nonfederal lands needed for the Niagara Project. The term "reservation" has a special meaning in the Federal Power Act, comprehending only lands owned in fee by the United States or in which the United States has a real property interest.

A. Section 4(e) of the Power Act authorizes the Federal Power Commission to license hydroelectric and other facilities "upon any part of the public lands and reservations of the United States", among other areas. This grant of power is followed by the proviso at issue, establishing conditions for licenses "within any reservation." Thus, Section 4(e) is limited by its own terms to "reservations *of the United States.*"

The requirement of a definite proprietary interest in the Government is necessarily established by the definition of "reservations" in Section 3(2) of the Power Act, as "national forests, tribal lands embraced within Indian reservations, military reserva-

tions and *other* lands and interests in lands *owned by the United States* * * *" [emphasis added]. "Tribal lands" are thus designated among other federal lands—all the other lands referred to in the definition of "reservation" are indisputably federally-owned lands—and are qualified by the express statement that they must be "owned by the United States." This the legislative history confirms. The Government's parental or guardianship relation to Indian lands is not a proprietary "interest in land", within this definition.

B. In Section 4(e)'s grant of licensing authority to the Federal Power Commission, "public lands and reservations" constitute an independent basis of federal jurisdiction, apart from the commerce power over navigable streams. This Court has already held that the licensing power on "reservations" is based upon the Property Clause of the Constitution; in other words, the term "reservation"—in the grant of power to license, as well as in the proviso limiting that grant—must be construed to mean lands which are "Property belonging to the United States" (Constitution, Article IV, Section 3). *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443. The legislative history of the licensing power supports this conclusion and refutes the belief of the court below that, by "reservations", Congress included Indian lands outside of federally owned property. In this part of the Power Act, Congress was exercising only its authority to control and dispose of *federal property*.

C. The same special meaning for "reservation" follows from the Power Act's plan of compensation for lands. Under Section 21, licensees may condemn lands and properties needed for licensed projects. However, this does not cover lands owned by the United States; instead, Section 10(e) prescribes payment to the Government of "reasonable annual charges * * * for recompensing it for the use, occupancy, and enjoyment of its lands or other property". A proviso of Section 10(e) provides that "tribal lands embraced within Indian reservations" are included within these *Government* lands for which an annual charge is paid *to the United States.* The appropriate method of acquiring other lands—private or non-federal lands, such as the Tuscarora lands in suit, or interests in them—is by a condemnation proceeding.

D. Respondent and the court below have erroneously asserted that no distinction is ever made between different types of Indian reservations. To the contrary, the term "reservations" has been used in various statutory contexts as referring to some, not all, Indian reservations. The Federal Power Act is such a statute, which distinguishes between Indian reservations in which the United States owns trust title (or other real property interest) and reservations in which the Government has no real property interest. As we have shown, that distinction is based upon the nature of the jurisdiction exercised by the Federal Power Act, *i.e.*, jurisdiction founded on the Federal Government's right to control its own property.

III

Even if the decision below with the respect to the Tuscarora lands was proper, the Court of Appeals erred when it entered a judgment which in effect compelled the implementation of a modified license, instead of remanding the case to the Commission for its further consideration. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21.

ARGUMENT

The importance of this case can be measured by the scope of the long-awaited Niagara Project. Harnessing the spectacular kinetic energies of the Niagara Falls and River will be the largest hydroelectric development in the country. And the remarkable fact is that, when the natural flow and drop are combined with the "very ingenious system" of a pump-storage reservoir,[14] more than four-fifths of the project's rated kilowatt capacity will be "dependable", *i.e.*, available under the worst foreseeable conditions, for at least 17 hours of each working day. Fully 1,800,000 kilowatts of capacity can be guaranteed to the power grid of a great industrial area.[15]

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[14] So described on the floor of Congress by Senator Douglas in 1956, 102 Cong. Rec. 8156. See also fn. 17, *infra*, p. 31.

[15] "Installed capacity"—2,190,000 kilowatts for the Niagara Project—signifies the nameplate rating of the generators. "Dependable capacity" means the electrical capacity available under the worst possible conditions. It was calculated here by taking the lowest recorded flow for the Niagara River and the most stringent treaty limitations upon diversion.

Niagara is unique among hydroelectric developments in the United States, because it does not have the wide fluctuations in flow characteristic of other rivers. In some developments

The Court of Appeals directed the Federal Power Commission to eliminate use of lands of the Tuscarora Nation for the Project. But as the record shows, and as the Commission has concluded and hereby reaffirms, Indian lands are absolutely essential for the construction of a pump-storage reservoir with 60,000 acre-feet storage, which in turn is indispensable to the dependable production of 1,800,000 kilowatts. Thus, the judgment below, if unreversed, will undoubtedly compel a serious reduction in the anticipated output and value of the Project.

This conflict itself goes far to demonstrate that reversal is required. For any limitation of the Project's dependable capacity would frustrate Congress' express direction, in Public Law 85–159 (the Niagara Development Act of 1957), to utilize *all* the United States share of the Niagara River water acquired by

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due to this fluctuation, "dependable" is far below "installed" capacity. In others, dependable is available only for short periods, as little as four hours a day, and if the facility were run for 17 hours a day, as at Niagara, it would produce less than ¼ the dependable power from the same quantity of water. Such facilities could not adequately serve the Niagara market which includes plants requiring continuous high-load supply (*e.g.*, electro-chemical, electro-metallurgical production). Niagara's volume and availability of flow, when regulated in the pump-storage reservoir, provide the type of capacity particularly needed. A pump-storage reservoir of the size contemplated is necessary to achieve this capacity.

The remarkable constancy of the Niagara River is shown by comparison with, *e.g.*, the Columbia River, the world's largest hydroelectric power producer. Maximum flow on the Columbia (at The Dalles) is more than 35 times the minimum, while on the Niagara, maximum is less than three times the minimum (considering the treaty limitations, the water available for power varies by a factor of less than 5—see fn. 4, *supra*).

treaty with Canada. *Supra*, pp. 6, 7, 10–11. In answer, the court below relied upon conditions governing the taking of a "reservation" in the Federal Power Act. But, as we shall show in Point I, any such application of the Power Act was superseded by Public Law 85–159. Furthermore, we submit (in Point II) that the Tuscarora lands are not part of a "reservation" within the special meaning of that term in the Power Act—even if it is applicable—and, hence, may be condemned like ordinary private lands.

I

IN PUBLIC LAW 85–159 (THE 1957 NIAGARA DEVELOPMENT ACT), CONGRESS NECESSARILY AUTHORIZED THE TAKING OF TUSCARORA LANDS NEEDED FOR FULL DEVELOPMENT OF THE NIAGARA PROJECT, WITHOUT REGARD TO LIMITATIONS IN THE FEDERAL POWER ACT WHICH WOULD OTHERWISE BE APPLICABLE

A. THE 1957 NIAGARA DEVELOPMENT ACT SUPERSEDED THE FEDERAL POWER ACT TO THE EXTENT REQUIRED FOR FULL UTILIZATION OF THE NIAGARA WATERS, WHICH CONGRESS CONTEMPLATED AS PRODUCTION OF 1,800,000 KILOWATTS OF DEPENDABLE CAPACITY WITH A 60,000 ACRE-FEET RESERVOIR

1. The keystone of the judgment below, directing the elimination of Tuscarora lands from the Niagara Project, was the assumption that, in authorizing the Project in 1957, Congress limited itself to a few aspects but did not prescribe the project works or even know of a storage reservoir, and that it left the essential decision-making to the Federal Power Commission subject to the regular terms of the Federal Power Act (R. 425–428). On this point, the decision below is in direct conflict with the views of the

Second Circuit, expressed in a suit dealing with condemnation of the Tuscarora lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U.S. 841. We submit that the terms and legislative history of the 1957 Act show that the court below has erroneously and restrictively read Public Law 85–159, and that Congress effectively superseded any limitations upon the Niagara Project arising from the Federal Power Act or other provisions of law which would reduce the size of the pump-storage reservoir.

In the first place, contrary to the opinion below, Congress was fully cognizant of the project works and kilowatt production entailed by the stated legislative objective—"a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159, p. 76, *infra*. Particularly with this type of legislation, the general terms must be read against the reports and the legislative background. Congress customarily deals with such projects by brief reference to a plan or its name or description.[16]

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[16] Authorization of federal projects is ordinarily by reference to Corps of Engineers reports or plans. *E.g.*, River and Harbor Act of 1958, 72 Stat. 297–300; Flood Control Act of 1958, 72 Stat. 305–315; Rivers and Harbors Act of 1945, 59 Stat. 10, 12–23. Subsequent reference in appropriation acts is most often by popular name only. *E.g.*, Public Works Appropriation Act of 1960, 73 Stat. 491, 493, 495 ("Missouri River, Kansas City to Mouth," "Allegheny River Reservoir," "Alamogordo Dam (Carlsbad Project), New Mexico"); Public Works

The works eventually incorporated in the licensed Niagara development were repeatedly described to Congress during the seven years of hearings and discussion separating the 1950 treaty with Canada from the enactment of Public Law 85-159; and, as the reports reiterated, there was throughout "no controversy as to the most desirable engineering plan of development". S. Rept. 539, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 7; H. Rept. 2635, 84th Cong., 2d sess., pp. 11-12; S. Rept. 2501, 83d Cong., 2d sess., p. 6; H. Rept. 713, 83d Cong., 1st sess., p. 8; 102 Cong. Rec. 8074, 8080, 8238; 99 Cong. Rec. 8386; see S. Doc. 113, 84th Cong., 2d sess., p. 11. "The development plan will be the same whether the project is constructed by private enterprise, the Federal Government, or the Power Authority of the State of New York." 99 Cong. Rec. 8386.

The court below apparently believed that Congress did not anticipate use of a pump-storage reservoir (R. 426). This is a significant error. As the Second Circuit has pointed out, the 1957 committee reports described such a reservoir in their summaries of the project plans. *Tuscarora Nation of Indians* v. *Power Authority, supra,* 257 F. 2d at pp. 893-894. See S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., p. 6. Further, every presentation of the development plans to Congress during the previous years included the same reservoir system, in

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Appropriation Act of 1957, 70 Stat. 474, 476, 480 ("Moorhead Dam and Reservoir, Montana," "Mississippi River—Gulf Outlet, Louisiana," "Garrison Dam and Reservoir Project on the Missouri River").

the same general location on the Niagara escarpment some distance east of the Lewiston plant. The Senate and House Committees, and the Congress, were told on numerous occasions from 1950 to 1957 of the purpose and operation of the pump-storage reservoir, and its indispensable role in storing excess flow in order to provide dependable power during the daytime hours of peak demand (p. 5, *supra*).[17]

The only variation in the descriptions of the pump-storage reservoir to Congress lay in the proposed size.

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[17] *E.g.*, S. Rept. 1408, 84th Cong., 2d sess., p. 5; H. Rept. 2635, 84th Cong., 2d sess., p. 10; S. Rept. 2501, 83d Cong., 2d sess., p. 5; Hearings on Development of Power at Niagara Falls, N.Y., before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st sess., p. 71; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 11–14; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 19–20, 28–29, 66, 74–75; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 34, 66, 77; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 13, 23, 121; Hearings on Niagara Falls and River, N.Y., before the House Committee on Public Works, 81st Cong., 1st sess., pp. 11, 30, 39, 75; 102 Cong. Rec. 8077, 8156, 8237; 99 Cong. Rec. 8385. See also S. Doc. 113, 84th Cong., 2d sess., pp. 30–31; Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949), pp. 42–43.

Any reduction in the volume of the reservoir will decrease the firm kilowatt capacity in a roughly linear proportion for most of the relevant figures (R. 225–226). Correspondingly, the Corps of Engineers had advised Congress that increase in power production would call for a larger reservoir (then expected in a later development stage, with regulation of Lake Erie level). S. Doc. 113, *supra*, pp. 11, 41.

Up to 1956, the plans for the reservoir varied between 22,000 acre-feet storage capacity covering 850 acres, suggested in the Bureau of Power 1949 report and incorporated in the later proposal of Niagara Mohawk and four other private utilities;[18] 30,000 acre-feet covering 1,100 acres recommended by the Corps of Engineers;[19] and 41,000 acre-feet covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reser-

[18] Bureau of Power, *Possibilities for Redevelopment of Niagara Power* (1949), pp. 42–44, and maps at frontispiece, Exhibits 8, 9, 10. The private utilities' plan for a storage reservoir was presented in the Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., p. 78 (and map following). This size pump-storage reservoir is also set forth in H. Rept. 862, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 5; H. Rept. 2635, 84th Cong., 2d sess., p. 10; S. Rept 2501, 83d Cong, 2d sess., p. 5; Hearings on Niagara River Power Project before a Subcommittee of the Senate Committee on Public Works, 84th Cong., 1st sess., p. 74; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 34, 69–70 (maps), 77; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 16–17 (maps), 121; Hearings on Niagara Falls and River, N.Y., before the House Committee on Public Works, 81st Cong., 1st sess., p. 11. See fn. 7, *supra*.

[19] S. Doc. 5, 84th Cong., 2d sess., pp. 7, 14, 30–31, 33, 36, 41; maps following p. 45, Sheets 2, 6, 7. This size pump-storage reservoir is set forth in S. Rept. 539, 85th Cong., 1st sess., p. 5; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 11–14; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 13–14, 25, maps following p. 16. See fn. 9, *supra*.

vation," proposed by the New York State Power Authority.[20]

After the Schoellkopf plant was largely demolished in June 1956 (*supra*, p. 9), an additional 20,000 cubic feet of water per second—in other words, *all* the United States share—became available for use in the proposed Niagara Project. Again, Congress was amply informed of the fact that the Schoellkopf disaster meant a larger development at Lewiston and that this in turn included a 60,000 acre-feet storage reservoir, considerably larger than previously envisaged. The 1957 Committee reports stated that the plans had been revised by the New York Power Authority in order to utilize all the treaty waters and the Project was therefore increased to an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be firm dependable power on a 17-hour daily basis. S. Rept. 539, 85th Cong., 1st sess., pp. 5–6; H. Rept. 862, 85th Cong., 1st sess., pp. 6–7.[21]

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[20] New York State Power Authority, Niagara Power and Park Development (1954), "Project Features", set forth in Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 131–132, 134–135; see S. Doc. 113, 84th Cong., 2d sess., pp. 6, 11; R. 251–252, 254–257, 273–274. The location of the Authority's proposed reservoir is quoted from the Hearings, *supra*, p. 132.

[21] The estimates of the Project's dependable capacity prior to the Schoellkopf disaster varied from 1,240,000 kilowatts to 1,723,000 kilowatts, partly due to differing assumptions as to the period of peaking required. See Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st. sess., p. 135; Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949), pp. 8, 47–48; S. Doc. 113, 84th Cong., 2d sess., pp. 7, 31, 41.

The Niagara redevelopment bill was reported out June 27,

The 1957 Congressional Committee reports continued that "in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required." S. Rept. 539, 85th Cong., 1st Sess., p. 5; H. Rept. 862, 85th Cong., 1st Sess., p. 7. It would certainly be deduced from the indispensability of pump-storage support for dependable power (pp. 5, 9–10, 31, fn. 17, *supra*) that the increased dependable capacity—which Congress approved—would require a larger reservoir than had previously been considered.

1957, by the Senate Committee on Public Works (S. Rept. 539, 85th Cong., 1st sess.) with these statements (pp. 5–6):

"The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required. * * *

There is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by the Corps of Engineers, the Bureau of Power of the Federal Power Commission, the Niagara Mohawk Power Corporation, and the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station."

The full capacity proposed by the Power Authority was also accepted by the House Committee on Public Works in its report of July 23, 1957 (H. Rept. 862, 85th Cong., 1st sess., p. 7):

"As a result of the disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required. * * *"

Moreover, the revised plans developed by the New York Power Authority after the Schoellkopf disaster were explicitly shown to Congress by the Authority's presentation of its 26th Annual Report (Exhibit 191, R. Ex. 35–44) and its application for a license (including Exhibit 13, R. Ex. 1–9) at the Senate hearings of April 1957 (R. 3, 262–267, 271–272, 280–281, 383–385), and by submission of a brochure on the power emergency in the Niagara area (Exhibit 218, R. Ex. 131–149) to the House Committee and to all Senators and Representatives in July 1957 (R. 244–250; Exhibits 219–221, R. Ex. 151–154). Exhibit 191 charted out the project, including a clearly larger reservoir than shown on maps previously presented to Congress (R. Ex. 42–44).[22] Exhibit 13 analyzed the fluctuations in the flow of water available, and, with supporting computations, declared that a reservoir of 60,000 acre-feet was required to maintain a dependable capacity of 1,800,000 kilowatts (R. Ex. 4, 5, 6). Finally, Exhibit 218 listed the revised specifications for all the project works, including the generators of increased capacity

[22] Compare R. Ex. 42–44 with the maps shown in S. Doc. 113, 84th Cong., 2d sess., Sheets 2, 6, 7 (submitted to Congress—see fn. 9, *supra*); Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., maps following pp. 16, 78; Hearings on Niagara Falls and Niagara River, New York, before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 69–70; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 16–17.

and a "Reservoir—Storage Capacity 60,000 Acre-Feet" (R. Ex. 132).

The court below mistakenly cited Senator Chavez's statement on August 12, 1957, that "No dams or provisions for storage of water are necessary" (R. 426). But the Senator meant only, as he immediately explained, that at Niagara Falls—unlike other developments—no artificial means were required to provide the basic flow for power purposes: "That storage is provided by the Great Lakes * * *. The power head is provided by the fall in the river * * *." 103 Cong. Rec. 14438. Senator Chavez, who had been chairman or member of the Senate Committee on Public Works from 1950 to 1957, clearly did not intend to disclaim the continued uniform legislative understanding that a pump-storage reservoir was indispensable to firm up the Project's dependable capacity.

Accordingly, Congress plainly comprehended the whole project works within its authorization of a Niagara power development utilizing *"all"* the waters available. In fact, this general objective had been translated into precise statistics—1,800,000 dependable kilowatts on a 17-hour basis and a 60,000 acre-feet storage reservoir.

2. Moreover, we submit that in Public Law 85–159 Congress clearly set aside any provision of the Federal Power Act which might restrict a development of this contemplated size.

Reading Public Law 85–159 against the legislative debates of the seven years following the 1950 treaty, it is immediately evident that the 1957 Act represents

a Congressional determination of the broadest possible scope, not the meager legislation supposed by the Court of Appeals for the District of Columbia Circuit. The salient contested issues throughout this period were matters of power policy. First, whether Niagara power should be developed by private companies, the New York Power Authority or, at least initially, by a federal body. Second, whether the Niagara development should serve as a public power "yardstick"—with preference for municipalities and cooperatives in New York and neighboring states, its own transmission lines, and control over resale rates. The Act's direction on each of these disputed points was "specific".[23] The Commission was instructed "to issue a license to the Power Authority of the State of New York". Section 1(a) of Public Law 85-159, *infra*, p. 76. The licensing conditions prescribed in Section 1(b) of the Act, *infra*, pp. 76-79, resolved all the "yardstick" issues and, also, the other open questions of allocation of costs and supply of electric power to Niagara Mohawk (see the Statement, p. 10, *supra*).

While in the absence of any then controversy Congress did not lay out the project works in detail, its command for "a power project with capacity to utilize all of the United States share of the water of the Niagara River" (Section 1(a), Public Law 85-159) constituted a shorthand direction for, among other

[23] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 894 (C.A. 2), certiorari denied, 358 U.S. 841. The Second Circuit's reference to the specific instruction on the licensee is equally applicable to all other disputed issues.

things, 1,800,000 dependable kilowatts and a 60,000 acre-feet storage reservoir. As we have seen, all essential engineering elements were foreseen by Congress, along with all essential questions of power policy (pp. 29–36, *supra*).

For convenience, Congress left the issuance of the license to the Commission, which could draw upon the Federal Power Act for additional conditions, administrative provisions, and general powers. Thus, Congress anticipated that some engineering details would be supplied under ordinary Federal Power Act criteria.[24] It also understood that the Power Act would supply auxiliary authority for execution of the project, including the power to condemn "lands or property of others necessary to the construction, maintenance, or operation". Section 21 of the Power Act, 16 U.S.C. 814 (see *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 890, 894). But this did not by any means dilute Congressional specification and authorization of the Niagara Project as

[24] The only substantial engineering point, previously raised, which was left open for the Commission to decide was the choice between tunnels, cut-and-cover conduits, or open canal to carry water through Niagara and Lewiston (see S. Doc. 113, 84th Cong., 2d sess., p. 9). This was later settled in the license proceedings (R. 395–399, 401; p. 11, *supra*). Other significant licensing conditions with respect to the project works dealt with minimization of interference with commerce and local activities during contruction, restoration of the surface area, development of fish and wildlife conservation facilities (R. 408–410). In addition, the Commission prescribed the annual charge to be paid by the licensee to the United States (R. 405). All other license conditions were derived from Public Law 85–159 and the previously contemplated project works.

planned. The essence of the Congressional decision was that the Power Act could not supply (or be utilized for) conditions or provisions which would conflict with the Niagara Project as authorized by Congress itself.

In passing Public Law 85–159, Congress clearly intended to supersede the Federal Power Act *pro tanto*, to the extent necessary to carry out Public Law 85–159. Congress was of course aware that it had taken over the decision of all disputed issues at Niagara (see S. Rept. 539, 85th Cong., 1st sess., pp. 1–3, 6–9; H. Rept. 862, 85th Cong., 1st sess., pp. 1–3, 7–9), despite proposals that it leave such matters to the Federal Power Commission and the Power Act.[25] And it knew,

[25] Senator Case had proposed that Congress should do no more than remove the treaty reservation (p. 7, *supra*) and thereby allow the Federal Power Commission to license the Niagara Project, applying the usual criteria of the Power Act. See S. 2599, 83d Cong., reported favorably in S. Rept. 2501, 83d Cong., 2d sess.; Hearings on Niagara Falls Power Development before the Senate Committee on Public Works, 83d Cong., 2d sess., pp. 450–451. The leading exponent of the opposing view was Senator Lehman, who urged that Congress itself should make the controlling decisions on large hydroelectric developments (and had done so in the past). Hearings, *id.*, pp. 86, 125–127, 418–420; Hearings on Niagara River Power Project before a Subcommittee of the Senate Committee on Public Works, 84th Cong., 1st sess., pp. 24–26; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 231–232. Senator Lehman's view prevailed and while the bill which became Public Law 85–159 represented a compromise, it did resolve each of the issues debated.

As we have noted (fn. 5, *supra*, p. 7), in June 1957, the Court of Appeals of the District of Columbia Circuit ruled that the reservation in the Niagara Treaty with Canada was of no effect and that the Federal Power Commission could license the Niagara Project under the Federal Power Act without further

for one thing, that the preference directed for sales to municipalities and cooperatives was a flat departure from the Power Act, as previously construed;[26] supersession would automatically result from such repugnancy. The matter was not left to implication, for the superiority of Public Law 85–159 over any inconsistent terms of the Federal Power Act was expressly established. Section 2 of Public Law 85–159 (*infra*, p. 79) instructed the Commission to follow its regular procedures in issuing the license but "in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." Cf. H. Rept. No. 862, 85th Cong., 1st sess., p. 11.

Accordingly, regardless of its construction of the Power Act, the Commission, acting under Public Law 85–159, could not issue a license to any applicant other than the New York Power Authority, nor could it

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legislation. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A. D.C.), vacated as moot, *American Public Power Association* v. *Power Authority of New York*, 355 U.S. 64. The House Committee took note of this decision but favored legislative action resolving all points nevertheless. H. Rept. 862, 85th Cong., 1st sess., p. 4.

[26] The proponents of the preference for municipalities and cooperatives, urging its adoption, pointed out under the ordinary provisions of the Power Act the license would not contain it. In the St. Lawrence power proceeding, the Federal Power Commission had ruled that the Power Act did not give it authority to direct the inclusion of such preference as a license condition. *In the Matter of Power Authority of the State of New York*, 12 F.P.C. 172, 177–179, 194–197; Hearings on Niagara Falls Power Development before the Senate Committee on Public Works, 83d Cong., 2d sess., pp. 114, 124–125, 153–154, 158–159, 169–171. See S. Rept. 1408, 84th Cong., 2d sess., pp. 7–8, 12.

deny the preference to municipalities and cooperatives for 50% of the power produced, or refuse to allow a sale of 445,000 kilowatts to Niagara Mohawk, and so forth. By the same token, the Commission had no authority to limit the license to partial utilization of the available waters—*i.e.*, for production of less than 1,800,000 dependable kilowatts—even if the Commission had believed that such a restricted power use would have been "best adapted to a comprehensive plan for improving or developing a waterway" under Section 10(a) of the Power Act, 16 U.S.C. 803(a), or that it was compelled by restrictions upon the eminent domain power which would ordinarily have been applicable. For the 1957 Act explicitly commanded "a power project with capacity to utilize all of the United States share of the water of the Niagara River", and any contrary provision of the Power Act would have to fall.

B. THE TUSCARORA LANDS MAY BE TAKEN, REGARDLESS OF THE PROVISO OF SECTION 4(e) OF THE POWER ACT, BECAUSE THEY ARE INDISPENSABLE TO THE PROJECT CONTEMPLATED BY CONGRESS AND THEIR USE WAS FORESEEABLE

1. The judgment below eliminating Tuscarora lands from the pump-storage reservoir was based upon the ruling that those lands constitute part of a "reservation" as defined in the Power Act, and that under a proviso in Section 4(e) of that Act, 16 U.S.C. 797(e), licenses for projects using such lands may be issued only after a finding, not present here, "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or ac-

quired * * *." We believe this ruling was erroneous, as we shall show in Point II, *infra*. However, even if the 4(e) proviso would otherwise be applicable to the Tuscarora lands, we submit that it cannot operate to impair the development of the full capacity of the Niagara Project. As we have shown above (pp. 28–41), Congress clearly comprehended a storage reservoir of 60,000 acre-feet as a necessary element of "a power project with capacity to utilize all of the United States share of the water of the Niagara River" (Public Law 85–159, *infra*, p. 76); and if any provision of the Federal Power Act would compel reduction of the storage reservoir, and hence of the dependable capacity of the Niagara Project, such provision was necessarily superseded by Public Law 85–159.[27]

When the Court of Appeals below remanded this case to the Power Commission to explore the possibility of a Section 4(e) finding, it apparently did not anticipate any inconsistency between the Power Act and the objective of Public Law 85–159. It stated: "On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope" (R. 431). However, the

[27] Moreover, the congressional and administrative determinations that the water resources should be used in the Niagara Project, that the development requires a pump-storage reservoir, and that Tuscarora lands are essential, are not subject to judicial review, at least so long as they had reasonable basis. *Berman* v. *Parker*, 348 U.S. 26; *Chapman* v. *Federal Power Commission*, 345 U.S. 153, 171; *United States* v. *Carmack*, 329 U.S. 230, 242–248; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

proceedings upon remand established these crucial facts—(1) that no Section 4(e) finding could be made to permit use of Tuscarora lands under the ordinary Power Act criteria; (2) if any doubt had existed, that a reservoir with storage capacity of 60,000 acre-feet was required to utilize the United States share of water and any reduction would reduce the Project's firm capacity below 1,800,000 kilowatts; and (3) that the Tuscarora lands were indispensable to a reservoir with storage capacity of 60,000 acre-feet.

The first of these crucial facts consisted of the Commission's decision that the use of Tuscarora lands would interfere and be inconsistent with the reservation purposes, and, therefore, that if the proviso of Section 4(e) controlled, the taking of those lands could not be justified (R. 488–489). The second critical fact of the indispensability of a 60,000 acre-feet reservoir to a Niagara Project with 1,800,000 kilowatts dependable capacity had been developed upon the original grant of license (R. 3, 394; R. Ex. 4, 5, 6) and was reaffirmed by the Commission upon the remand, after receiving additional proof (R. 224–227, 230–231, 487–488).

As for the third crucial fact, the indispensability of the Tuscarora lands to a 60,000 acre-feet reservoir was established by exhaustive studies of all alternative locations, conducted by the New York Power Authority's engineering consultants. After eliminating a "dumbbell" shaped storage and others, the engineers narrowed the possibilities to those four shown on Exhibits 162, 163, 164 and 165. Of these, all but

Exhibit 165 were then eliminated because of engineering and topographical problems, excessive size or irregular shape, drainage losses, and community displacement (R. 25–36, 46–47; R. Ex. 15–21). Ultimately, even the Exhibit 165 plan, the best of the alternatives, was found to be entirely infeasible.[28]

That alternative plan would impose large additional costs on the Niagara Project. Instead of 1,383 acres and 37 homes from the Tuscarora lands (p. 13, *supra*), the Exhibit 165 plan would take 1,721 acres to the south, including about 440 homes, a million-dollar school, a church, two cemeteries and one store and home (Exhibit 189, R. Ex. 31; R. 49–51, 101–102, 105, 487). The land, buildings and improvements on the area to be substituted for Indian lands were appraised at $12,880,000 (R. 48), and the actual cost would be considerably greater, since it would include relocation of most of the homes and two cemeteries (R. 125, 150–151, 152–153).[29]

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[28] Comparison of the licensed reservoir (Exhibits J, 161, R. 417, R. Ex. 13) with the alternatives is facilitated by material in the record. On Exhibits 162, 163, 164 and 165 (R. Ex. 15–21), the lighter areas are those substituted for the Tuscarora lands. Further, a map and an aerial photograph (Exhibits 189, 190, R. Ex. 31, 33) show the relation between the lands needed for the best of the alternatives (the plan on Exhibit 165) and the licensed reservoir.

[29] Relocation of structures is more expensive than purchase (R. 153). Most of the 445 homes in the alternative area on Exhibit 165 are relatively new and the Power Authority would have to move them; the school would be demolished (R. 125, 150–151, 153). The cost of moving the cemeteries (about 3,000 graves) would be about $400 per grave plus other improvements and purchase of the site (R. 109, 130–131).

In comparison, the land and improvements on the Tuscarora lands were appraised at $980,000, and only about 65 percent of 37 homes would be moved (R. 72–73, 110, 124). To this difference must be added an increase in the cost of the reservoir and of transmission lines,[30] the cost of a substantial delay in construction (R. 487),[31] and what the Commission found to be the "unreasonable expense" of rerouting a main highway and, in some alternative possibilities, railroad tracks (R. 487).[32] The evidence developed showed that the comparative costs were not merely matters of "economy" as the court below initially believed (R. 431), but were so disproportionate as to affect the reasonableness of the alternative plans. Cf. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554.

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[30] Aside from land values and other items, the construction of the reservoir on Exhibit 165 will itself cost about $3,500,000 more than the licensed reservoir, because of topographical and drainage problems (R. 37, 46). In addition, a longer transmission line will be required, which would have cost $300,000 more at the outset (R. 39–40, 95) and will now cost about $1,200,000 more, including relocation of previous work (R. 40, 96–97).

[31] The Power Authority's general manager estimated that interest charges were 70-odd thousand dollars a day (R. 279). Just the relocation of the large number of buildings and residents from the alternate site would take two to three years after the land was acquired (R. 150, 241). As the general manager testified, delay will affect the rate base of future power production (R. 279, Tr. 4948).

[32] Exhibit 165 would approach, but not sever, the railroad tracks at its southern boundary (Exhibit 189, R. Ex. 31). These tracks constitute a main line of the New York Central Railroad, connected with marshalling yards, and part of a grade-crossing elimination program. Their present location was one of the limiting factors to all alternatives seriously considered. R. 26, 129–130, 239–240.

Moreover, an insuperable obstacle is presented by the community disruption which would be caused by the Exhibit 165 alternative. Earlier, the Commission had rejected an open canal 200 feet wide through Lewiston and Niagara Falls because of the deleterious effect upon the town's development, despite proposed bridges and crossings (p. 11, *supra*). The reservoir in Exhibit 165, which cannot be bridged, would have much graver consequences, as numerous witnesses testified. It would "dismember" the town of Lewiston, preventing its orderly development and cutting off water, sewage, fire protection, and other utilities and services to a substantial area (R. 121–123, 140–142, 144–148, 208–222, 237–239, 487). It would also sever the main highway which connects Lewiston and Niagara Falls to the county seat at Lockport, requiring a roundabout detour (R. 17–18, 103, 215, 219).

Combining the cost factors with the disruptive impact upon the area, it is clear that no real alternative exists to the Project as licensed. The general manager of the Power Authority testified that Exhibit 165 did not present a feasible plan, that there is no alternate site for the pump-storage reservoir, and that if the Tuscarora lands were eliminated the Authority would have to use a smaller reservoir (R. 268, 283–285). The Commission specifically found that omitting the Indian lands from the reservoir as licensed would cut its storage volume by half, to 30,000 acre-feet, resulting in a loss of 300,000 kilowatts of dependable capacity of the Niagara Project (R. 488). While the New York Power Authority has since applied to redesign the reservoir to raise the dikes and avoid

one-half of the storage loss, a serious detriment is unavoidable. The proposed modification would still result in a loss of 150,000 kilowatts of dependable capacity from the 1,800,000 kilowatt project expressly contemplated by Congress.[33]

The result of the decision below, in short, is that the Niagara Project will not utilize all the waters made available by the treaty with Canada if the requirements of Section 4(e) of the Power Act must be met. This consequence of a conflict between the Power Act and full utilization of Niagara waters was, we have shown, expressly precluded by Public Law 85–159. The District of Columbia Circuit erred when it failed to prefer Public Law 85–159.[34]

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[33] Some of the technical and cost problems involved in raising the reservoir dikes above the level in the Project as licensed were indicated in testimony at the hearings preceding issuance of the license (R. 5–11, 394). On remand, the Commission found that raising the dikes to make a storage capacity of 60,000 acre-feet "is technically infeasible and is economically undesirable" (R. 488). The Power Authority now proposes to attain a storage capacity of 45,000 acre-feet. Its application was filed on March 2, 1959, and has not yet been acted upon by the Commission.

[34] The court below held that the 4(e) proviso was applicable under the provision of Public Law 85–159 authorizing the inclusion, along with the seven specified "licensing conditions", of "those deemed necessary and required under the terms of the Federal Power Act" (R. 425, 428). But the general licensing "conditions" of the Power Act are set forth in its Section 10, 16 U.S.C. 803 (App., *infra*, p. 81); consequently, the only conditions under the Power Act which may be deemed necessary and required for the Niagara Project are those arising from Section 10, and not inconsistent with Public Law 85–159. The limitation on the utilization of land in a "reserva-

2. The Second Circuit, in sustaining the State Authority's power to condemn Tuscarora lands, recognized as a possible ground therefor the point just discussed—"the impracticability of constructing [the project] without taking a portion of the Tuscarora Reservation". *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 893. However, without making any findings on the indispensability of the lands to the authorized development, the Second Circuit found that Congress had impliedly sanctioned the challenged condemnation. Because of the size and extent of the project, the contemplated necessity for a pump-storage reservoir, and the proximity of the Indian lands, the likelihood that these lands would be taken was found to have been within the Congressional knowledge and intent. 257 F. 2d at 893–894.

The Second Circuit found that "it may be assumed" that Congress had general knowledge of the terrain and of the existence of the reservation in the vicinity. 257 F. 2d at 894. This is buttressed by the fact that maps of New York State or of the locality clearly delineate the Tuscarora lands east of Lewiston in the approximate reservoir location. *E.g.*, Encyclopedia Britannica, World Atlas (1942 ed.), Map No. 172–173; 20 Encyclopedia Americana (1958 ed.), map following p. 202; Rand McNally, Commercial Atlas and Marketing Guide (Centennial ed. 1956), p. 310. In fact, the Corps of Engineers report on the Niagara Project to

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tion" is contained in Section 4(e) of the Power Act, not Section 10, and, thus, should not be applicable even apart from the supersession which results from the conflict with Public Law 85–159.

the Senate Committee on Public Works explicitly referred for background information to a government survey map (among others) which shows the Niagara River area and the Tuscarora Reservation. U.S. Lake Survey, Chart No. 31 ("Lake Erie"), cited in S. Doc. 113, 84th Cong., 2d sess., p. 22.[35]

In addition, the Power Authority's initial proposal for a pump-storage reservoir of 41,000 acre-feet, covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reservation," was plainly described to the House Committee in 1955. Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., p. 132. When Congress was later told that the reservoir was being increased to 60,000 acre-feet after the Schoellkopf disaster (pp. 9–10, 33–36, *supra*), it must have been anticipated that Indian lands were involved.

The rough map of the enlarged reservoir in Exhibit 191 (R. Ex. 42–44), presented to Congress in 1957, did not indicate any property lines. However, before the Federal Power Commission, the Power Authority's resident engineer testified without contradiction that from the roads indicated (including Whitmer Road and Military Road—R. Ex. 42), anyone familiar with the area would have realized that

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[35] Repeated Congressional reference to the report of the Corps of Engineers has already been noted, fns. 9, 19, *supra*. See, also, for other government maps of the area, U.S. Geological Survey: Eastern United States 1:250,000, Map No. NK 17–3 (30–M) ("Toronto"); New York 1:25,000, Maps Nos. 5170 II NE, 5170 II SE, 5270 III NW ("Lewiston," "Niagara Falls," "Ransomville").

Indian land was involved (R. 151, 157–158). The same map was printed in the local Niagara Falls newspaper in January 1957 (Exh. 187, R. Ex. 29) and mailed to responsible members of the Tuscarora Nation in January and February 1957, along with the explicit information that the reservoir as planned included a portion of the Tuscarora Reservation (Exhibits 192, 193, R. Ex. 45–46; R. 110–112). Thereafter, in March 1957, the Power Authority sought the tribe's permission to survey land (Exhibits 186, 193, R. Ex. 27–28; R. 112). (*Supra*, p. 15). The silence of the respondent Nation after it was put upon notice that use of its lands was contemplated further detracts, we submit, from the force of its insistence that Congress did not show any overt awareness that Indian lands were involved when Public Law 85–159 was passed in August 1957.[28]

The District of Columbia Circuit apparently believed that testimony before Congress in 1956 indicated that all project lands belonged to the Niagara Mohawk Power Company (R. 426). This is not so. While a Corps of Engineers official made such a statement in response to queries by Representative Dondero, the counsel for the Power Authority immediately testified, in contradiction, that only part was Niagara Mohawk's. Hearing on Niagara Power Before the House Committee on Public Works, 84th Cong., 2d sess., pp. 11–12, 27–28; R. 260–261. Most significant, there was never any issue over the power to con-

[28] At the time the Authority presented its plans to Congress, there was apparently no reason to believe that any problem would arise over acquisition of the Tuscarora lands.

demn any property needed, an authority which the Power Authority counsel then asserted. Hearings, *id.*, pp. 23–24, 28, R. 257–259. Rather, Niagara Mohawk's alleged ownership was cited in 1956 and earlier by Representative Dondero and other congressmen who favored private development at Niagara only to stress the ability of the private utilities to proceed, and the alleged interference with private enterprise.[37] Actually, Niagara Mohawk owned only 42% of the land required for the Project as finally licensed (Exhibit 18, R. Ex. 11; R. 290). As we have shown, the Tuscarora lands now in question were among the other lands use of which is indispensable to the Project, was reasonably foreseeable, and hence was authorized by Congress.

C. NO OBSTACLE IS PRESENTED TO THE USE OF TUSCARORA LANDS BY GENERAL RULES GOVERNING ACQUISITION OF INDIAN LANDS

Congress did not, in Public Law 85–159, establish an independent power of eminent domain applicable to the Niagara Project. It relied upon the licensee's power under Section 21 of the Power Act, 16 U.S.C. 814. However, we have shown that Public Law 85–

[37] See, *e.g.*, Hearings, *ibid.*, and the congressmen's previous remarks concerning Niagara Mohawk's ownership of lands in Hearings on Niagara Power Development, before the House Committee on Public Works, 84th Cong., 1st sess., p. 102; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 44, 70, 129–130; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., p. 144; 99 Cong. Rec. 8386–8387; see H. Rept. 713, 83d Cong., 1st sess., p. 5.

159 superseded any limitation arising from the proviso in Section 4(e) of the Power Act upon the exercise of eminent domain applicable to Tuscarora lands. In our view, this conclusion is compelled (as we have seen) by the terms of the 1957 Niagara Development Act, the indispensability of the Tuscarora lands to the statutory objective, and the extent of Congressional knowledge and anticipation. Moreover, there is nothing in the law applicable generally to Indian lands which militates against this result.[38]

1. Even when Indian treaty obligations are thereby overridden (which is not the case here—see pp. 55–57, *infra*), Congress may authorize the taking of Indian lands by eminent domain. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 116–118. And it has been repeatedly held that such authorization does not require that Congress expressly desig-

[38] There is no Congressional indication in the background of Public Law 85–159 that Indian rights were to be a special exception to full utilization of the Niagara River. On the contrary, a representative of the Seneca Nation appeared in the 82d Congress hearings and asserted that the development was precluded by his tribe's claim to a one-mile strip, including the Niagara River, on the ground that transfers in 1802 and 1815 were invalid. The committee members told him that he had come to the wrong tribunal, that it was a judicial question; members of the House Committee specifically said the claim was for adequate compensation upon condemnation. See Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 163–166; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 182–188.

nate the Indian lands. The Federal Power Act's special condition for certain Indian lands (Point II, *infra*) sufficiently shows that Indian lands generally, when needed and appropriate for licensed developments, are covered by that Act's eminent domain provision. Cf. *Kindred* v. *Union Pacific R.R. Co.*, 225 U.S. 582, 596; *Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614 (C.A. 9). Moreover, even if we consider Public Law 85–159 alone, this Court has on a number of occasions found the necessary Congressional authorization from two factors amply demonstrable in this case—the necessity to use Indian lands for a project specifically authorized by Congress, or the presumption that Congress knew of Indian lands in the vicinity. *Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*, 160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118; cf. *Ward* v. *Race Horse*, 163 U.S. 504, 514–515; *Beecher* v. *Wetherby*, 95 U.S. 517, 526.[39]

Thus, the taking of Indian reservation lands was authorized by the grant of a railroad right-of-way which "necessarily involved their possession", despite the absence of any showing that Congress had been

[39] Some recent lower-court cases have also sustained condemnation of Indian lands by supplementing the statutory grants (which were silent on the subject) with legislative histories which specifically mentioned the Indian lands to be taken. *Seneca Nation of Indians* v. *Brucker*, 162 F. Supp. 580 (D. D.C.), affirmed, 262 F. 2d 27 (C.A. D.C.), certiorari denied, 360 U.S. 909; *United States* v. *21,250 Acres of Land*, 161 F. Supp. 376 (W.D. N.Y.); *United States* v. *5,677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.).

aware of that necessity (*Missouri, Kansas & Texas Ry. Co.* v. *Roberts, supra,* 152 U.S. at 117). The general terms of the Reclamation Act of 1902 were sufficient as against Indian lands "when necessary for reclamation purposes" (*Henkel* v. *United States, supra,* 237 U.S. at 50). And a grant for a specific canal superseded Indian treaty rights on the canal route, the Court stating (*Spalding* v. *Chandler, supra,* 160 U.S. at 406–407):

> * * * Whatever the reason * * * for the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty, and *as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass,* the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes. * * * [Emphasis added.]

We have already shown the necessity, the indispensability, of Tuscarora lands to the Niagara Project contemplated by Congress (*supra,* pp. 42–47); this indispensability brings this case within the controlling authorities we have just discussed.

Furthermore, as a second independent ground, the Second Circuit's view that Congressional authorization arises from presumed knowledge of the Tuscaroras' location (pp. 48–51, *supra*) is also supported by decisions of this Court. In *Henkel* and in other cases, the Court presumed that Congress knew Indian

lands might be involved, and had impliedly included them, because of the scope of the projects (or other legislative objectives) in areas in which reservations were located. See *Henkel* v. *United States, supra,* 237 U.S. at 49; *Ward* v. *Race Horse, supra; Beecher* v. *Weatherly, supra.*[*]

2. While Public Law 85–159 is thus sufficient to authorize the taking of Tuscarora lands even under the general rule governing acquisition of treaty reservations, the requirements in this case are much less stringent. Both the court below and the Second Circuit recognized that the Tuscarora lands sought for the Niagara Project are not part of a reservation created by treaty, statute, or executive order, but were purchased by the tribe with its own funds. R. 429; *Tuscarora Nation of Indians* v. *Power Authority,* 257 F. 2d 885, 887 (C.A. 2), certiorari denied, 358 U.S. 841; see S. Rept. 1836, 81st Cong., 2d sess., p. 2; see the Statement, pp. 13–15, *supra.* These lands are protected by the statutes prohibiting alienation of In-

[*] In *Spalding* v. *Chandler*, 160 U.S. 394, 406, the Court found support for Congress' knowledge of the reservation's existence from a law passed two years before the canal grant, which authorized a survey of the area and specifically included the reservation.

Similarly, in the instant case, Congress in 1950 and 1948 passed laws dealing with civil and criminal jurisdiction of New York state courts over Indians and Indian reservations, which were clearly based upon explicit knowledge that the Tuscaroras were one of the "recognized tribes" and "reservations" referred to in those statutes. Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. 233; Act of July 2, 1948, 62 Stat. 1224, 25 U.S.C. 232. See S. Rept. 1836, 81st Cong., 2d sess., pp. 3, 5; H. Rept. 2355, 80th Cong., 2d sess., p. 3.

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dian lands without federal approval (25 U.S.C. 177, 233; R. 423–424; 257 F. 2d at 888–889), but that legislation presents no obstacle to the exercise of the federal power of eminent domain authorized by Congress.

The restraint upon alienation is inapplicable here because it does not in terms limit the sovereign (*Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *Wittek*, 337 U.S. 346, 359; *Grand River Dam Authority* v. *Federal Power Commission*, 246 F. 2d 453, 455 (C.A. 10)). Moreover, since the restraint was intended to impose federal supervision so as to prevent sharp dealing by private persons, its purpose would not extend to federal condemnation proceedings with their assurance of just compensation (see *United States* v. *Candelaria*, 271 U.S. 432, 441–442; *Alonzo* v. *United States*, 249 F. 2d 189 (C.A. 10), certiorari denied, 355 U.S. 940). As the Second Circuit held on this very point, "the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question." *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 893.

In this case, it is clearly the federal eminent domain power which is being exercised by the Power Authority under Public Law 85–159 and the Federal Power Act.[41] As long as those statutes are satisfied, we sub-

[41] See *First Iowa Coop* v. *Federal Power Commission*, 328 U.S. 152, 181, n. 25; *Kohl* v. *United States*, 91 U.S. 367, 373–374; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 890, 894.

mit that there is full authority to take any Tuscarora lands designated in the project license. The statutory restraint upon alienation, unlike a treaty, does not impose any independent requirement of Congressional action with respect to the particular Indian lands sought to be taken by federal condemnation. Condemnation by or on behalf of the Federal Government is adequate compliance.

If it be argued, however, that the use of lands in an Indian reservation (even without a treaty) should be protected as a prior public use, there are two answers. The first is that a federal use supersedes any others (*United States* v. *Carmack*, 329 U.S. 230), and the hydroelectric use here is definitively a federal use of prime importance. Second, the rule is that a general grant by Congress of condemnation power extends to property already devoted to an equivalent public use if the authorized project requires, for its execution, the taking of such property. *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799–800 (S.D. Ill.), affirmed, 252 F. 2d 354, 356 (C.A. 7); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (W.D. Mo.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 373 (E.D. Ill.). Cf. *United States* v. *South Dakota*, 212 F. 2d 14, 16 (C.A. 8). Again, the abundant proof of the indispensability of the Tuscarora lands to the Niagara Project (*supra*, pp. 42–47) also satisfies this requirement, if it exists.

II

THE TUSCARORA LANDS, FULLY OWNED IN FEE BY THE TRIBE, ARE NOT A PART OF A "RESERVATION OF THE UNITED STATES" WITHIN THE SPECIAL MEANING OF SECTION 4(e) OF THE FEDERAL POWER ACT AND MAY BE CONDEMNED LIKE OTHER NON-FEDERAL LANDS UNDER THAT ACT

Apart from the Congressional purpose to supersede the Federal Power Act with respect to the Niagara project, this case also raises the question whether the proviso in Section 4(e) of that Act applies at all to Indian lands here involved. Both the court below and the Second Circuit recognized that the tract sought for the reservoir was purchased and is owned by the Tuscarora Nation in fee. R. 429, 430; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 887; pp. 13–15, 55, *supra*. While the manner of acquisition and holding may not be pertinent to the statutes restricting alienation (pp. 55–56, *supra*), an entirely different question is presented here—whether these lands constitute a "reservation" under the special provisions of Section 4(e) of the Power Act. We submit that the term "reservation" in that Act comprehends only lands owned in fee by the United States, or in which the United States has some real property interest, and not the Tuscarora area needed for the licensed Niagara Project.[42]

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[42] On remand from the court below, the Commission ruled that, if the proviso of Section 4(e) were applicable, no finding of noninterference could be made to sustain the taking of the Tuscarora lands in suit. However, at the same time, it reaffirmed its earlier conclusion that these lands did not constitute a "reservation" under 4(e) and hence no finding was necessary (R. 413, 509).

A. *Definition of "Reservations" in the Power Act.*

1. Section 4(e) of the Power Act, 16 U.S.C. 797(e), authorizes the Federal Power Commission to license hydroelectric and other facilities "upon any part of the public lands and reservations of the United States" (among other areas—pp. 64, 80–81, *infra*). This general grant of power is followed by the limiting proviso here at issue—that licenses "within any reservation" may be issued only after a finding that the license will not interfere or be inconsistent with the reservation purposes and subject to conditions for its protection (*infra*, p. 81). It is thus clear, at the outset, that both the grant of power and the proviso of Section 4(e) apply only to "the public lands and reservations *of the United States*" (emphasis added). The special condition in Section 4(e) covering use of "reservations" for Power Act projects is limited, by its own terms, to those reservations which may properly be deemed to belong to the United States.

Second, there is a special definition of "reservation" in the Power Act which carries the same connotation and establishes that a definite title interest in the Government is needed. Section 3(2), 16 U.S.C. 796(2), provides:

> "reservations" means national forests, *tribal lands embraced within Indian reservations*, military reservations, and *other* lands and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands

> acquired and held for any public purposes; but shall not include national monuments or national parks. [Emphasis added.]

The plain purport of this definition is that, to constitute a "reservation" the lands must be "owned by the United States" and dedicated to certain uses, such as a national forest, military reservation, or as tribal lands within an Indian reservation. All the areas mentioned in Section 3(2) (leaving aside "tribal lands embraced within Indian reservations")—national forests, military reservations, "other lands and interests," "acquired" lands and interests—are indisputably federal lands in which the Government has a proprietary interest; if "tribal lands" can be non-federal (as respondent urges), they would be the only non-federal realty covered by the statutory definition of "reservation". In addition, the statute clearly conceives of "national forests, tribal lands embraced within Indian reservations, military reservations" as necessarily being federally owned because it goes on to refer to "*other*" federal lands and interests owned by the United States—a revealing term.[43]

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[43] Section 3(1) defines "public lands" as "such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined".

Respondent has asserted that, under our reading of Section 3(2), "tribal lands" would be protected only if created "under the public land laws" and that most Indian reservations, having been created by treaty and agreement, would not be covered (Brief in Opposition, p. 23, n. 12). This is obviously not so. In Sections 3(1) and 3(2), the words "under the public land laws" refer only to the methods of the "private appropriation and disposal" from which "reservations" are ex-

Respondent's contention that the phrase "owned by the United States" does not modify "tribal lands" is likewise refuted by the legislative history of Section 3(2). In the original draft bill of the Federal Water Power Act of 1920, as proposed by the Administration and as passed by the House in the 65th and 66th Congresses, the definition read as follows:

> "Reservations" means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws, and lands and interest in lands acquired and held for any public purpose.

See H. Rept. 715, 65th Cong., 2d sess., p. 22; S. Rept. 180, 66th Cong., 1st sess., p. 10." The Senate then

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cluded. The purpose was to exclude tribal lands *from* the provisions of the public land law, but it was not intended that the exclusion must be stated in the public land law itself. Lands are covered by Section 3(2) so long as they are excluded from disposition (under the public land laws) in any appropriate manner; they may be "withdrawn, reserved, or withheld", as the Section says, by any proper device. Our position is that "tribal lands" in Section 3(2), however created, are in effect modified both by the exclusion of ordinary disposition *and* by the phrase "owned by the United States".

Alternatively, the phrase "and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" can easily be read as if Section 3(2) stated: "other lands and interests in land owned by the United States provided that those *other* lands have been withdrawn, reserved or withheld from private appropriation and disposal under the public land laws."

"In the 65th Congress, the House substituted its bill, including authorization for projects on public lands and reservations and containing the quoted definition, instead of a Senate bill which applied only to navigable streams, not to federal lands. H. Rept. 715, 65th Cong., 2d sess., pp. 2, 3–4,

inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, *and other*" (emphasis added) at the beginning of the definition. See S. Rept. 180, 66th Cong., 1st sess., p. 10; 59 Cong. Rec. 1103.[48] When the House conferees accepted the Senate version, they explained the modification tersely: "This amendment recasts the House definition of 'reservations'." H. Rept. 910, 66th Cong., 2d sess., p. 7. It seems clear that no change in substance was intended or effected. The recasting merely specified, as illustrative, some of the federal "reservations." The phrase "owned by the United States" applies equally to all properties covered by the definition, as in the original draft bill, whether they now fall into one of the specified categories or into the residuary catch-all, "other lands and interests in land."

13–15; S. Rept. 179, 65th Cong., 2d sess., pp. 1–2. The House "reservation" provisions were accepted in conference (H. Rept. 1147, 65th Cong., 3d sess., pp. 2, 3–4) and the conference report was pending when Congress adjourned. The conference bill was reintroduced in the 66th Congress (H. Rept. 61, 66th Cong., 1st sess., pp. 1–2).

[48] The bill was enacted with this Senate amendment and the present form of the definition is the same, except for the deletion of the words "national monuments, national parks". The Act of March 3, 1921 (41 Stat. 1353) eliminated the Commission's authority under the Water Power Act to license any project works within national parks and national monuments. The quoted words were finally eliminated from Section 3(2) of the Act by amendment in 1935 (49 Stat. 838) conforming the definition of reservation to the restricted licensing power.

2. The court below did not disagree with this reading of the Act. It held, however, that the federal interest in protecting the Indians against improper alienation of their lands was a sufficient "interest in land" under Section 3(2) to bring the Tuscarora realty within the Power Act's limitation (R. 429–430). This conclusion is untenable. The United States, in its guardianship capacity, could sue to set aside unlawful alienations by Indians, but such protection of dependent peoples exemplifies only the sovereign's general concern with the public welfare (*Heckman* v. *United States*, 224 U.S. 413, 437–442; *United States* v. *Minnesota*, 270 U.S. 181, 194); it closely resembles, for example, actions by the United States as *parens patriae* on behalf of beneficiaries of charitable trusts. *E.g.*, *Mormon Church* v. *United States*, 136 U.S. 1, 56–62; *Mount Vernon Mortgage Corp.* v. *United States*, 236 F. 2d 724 (C.A.D.C.), certiorari denied, 352 U.S. 988; *Wallace* v. *Graff*, 104 F. Supp. 925, 926, 928 (D.D.C.).[46]

Characterizing the duty of guardianship towards Indians, this Court has said, "This national interest is

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[46] In *Mount Vernon Mortgage Corp.*, the Court of Appeals below pointed out that the suit by the United States as *parens patriae* to rescind transfers by the trustees of a charitable corporation was "analogous to one brought to enforce a public right, and closely analogous to one brought to enforce a right of an Indian tribe." 236 F. 2d at 725.

In both situations, when the Government sues without having any property interest, title or possession is restored to the Indians or the other persons protected. Compare *Heckman* v. *United States*, *supra*; *United States* v. *Mount Vernon Mortgage Corp.*, *supra*, affirming 128 F. Supp. 629, 636 (D.D.C.).

not to be expressed in terms of property * * *", *Heckman* v. *United States*, 224 U.S. at 437. In contrast, the phrase "lands and interests in lands" in the Power Act expresses only a concept of real property law. Particularly is this true, since Section 3(2) also uses the word "owned" and lists Indian lands along with others in which the Government clearly has a real property interest. Ordinary canons of construction call for the interpretation of these terms in the Power Act to refer to the Government's property rights—*i.e.* present or potential title or possession—not its public or parental responsibilities.

B. *"Reservations" as a Basis for Licensing Jurisdiction.* Our view that federal ownership is fundamental is also buttressed, and its rationale provided, by the context of the Section 4(e) proviso. The proviso, as we have pointed out, is a limitation upon the general grant of authority to the Commission to license projects "[1] in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, *or* [2] upon any part of the *public lands and reservations of the United States* (including the Territories), *or* [3] for the purpose of utilizing the surplus water or water power from any Government dam * * *" (emphasis added) (*infra*, pp. 80–81). For Power Act purposes, therefore, the existence of "public lands and reservations" constitutes an *independent* jurisdictional basis for licensing federal projects, apart from the commerce power (which is the basis of the first grant of authority to the Commission).

As this Court ruled in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, the Power Act's licensing power "in relation to public lands and reservations of the United States springs from the Property Clause" of the Constitution—Article IV, Section 3. The constitutional basis for such licenses is provided by construing "reservation" in the granting portion of the Power Act, as this Court has therefore done, to mean lands which constitute "Property belonging to the United States" (in the words of Article IV, Section 3). This conclusion was further spelled out in *Federal Power Commission* v. *Oregon* when the Court referred to the difference in the "established meaning" of the terms "public lands" and "reservations" in the Power Act. The former were federal lands subject to appropriation and disposal under the public land laws; the latter were not so subject. In other words, a "reservation" consists of *federal* lands of a certain type, dedicated to a certain purpose, such as for use as an Indian reservation, 349 U.S. at 443–444. See also *United States* v. *Celestine*, 215 U.S. 278, 285.

In contrast, the Tuscarora lands do not in any way constitute federal lands, or "Property belonging to the United States".[27] The license in this case could not, therefore, have been based upon the Property

[27] For the principle that ownership by the United States of legal or trust title in an Indian reservation makes it federal property under Article IV, Section 3, see, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 284–285; *United States* v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329, 330–331 (C.A. 10), certiorari denied, 323 U.S. 804.

Clause to any extent, but only upon the federal power over navigable waters, as the Commission stated at the time of issuance (R. 400). And just as the Tuscarora lands do not constitute a "reservation" for the purpose of Section 4(e)'s grant of authority to license hydroelectric projects "upon any part of the public lands and reservations of the United States," so use of those lands is not limited by the "reservation" proviso which follows at the end of Section 4(e) and restricts the congressional grant of power to the Commission with respect to "reservations."

To avoid this conclusion, the Court of Appeals was constrained to expand the licensing jurisdiction of the Power Act. It held that, in authorizing projects upon "reservations," Congress included *all* Indian reservations, exercising not only its power under the Property Clause but also the power to regulate commerce with Indian tribes (R. 430–431). The language of the Act certainly is to the contrary, since any such jurisdiction would more appropriately have been added (but was not) to the clause dealing with interstate and foreign commerce, as it is in Article I, Section 8 of the Constitution.[46] With respect to its invocation of commerce power, Congress referred only to *waters* over which it had jurisdiction "under its authority to regulate commerce *with foreign nations and among the several States*"; it did not refer at all to commerce with the Indians, and certainly it did not purport in its exercise of commerce authority to utilize its Indian

[46] "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

commerce powers with respect to Indian lands unrelated to navigable waters. See *supra*, p. 64.

The legislative history of the Power Act's licensing jurisdiction clearly controverts any intent, drawn by the court below from the word "reservation", to authorize projects (where no navigable stream is involved) upon lands entirely owned by Indian tribes. The Congressional statements setting forth the basis for federal power developments, leading up to the passage of the original Water Power Act of 1920, uniformly and explicitly refer to two heads of jurisdiction only—the commerce power over navigable streams, and the federal jurisdiction over the public domain under the Property Clause. These two constitutional bases had, indeed, previously prompted two separate bills, "one for navigable streams and * * * one for streams in the public domain" (59 Cong. Rec. 7733). The 1920 Act combined these proposals, just as it combined the authorities and efforts of the several cabinet departments and congressional committees exercising such jurisdictions. See, *e.g.*, H. Rept. 61, 66th Cong., 1st sess., pp. 3–5; S. Rept. 180, 66th Cong., 1st sess., pp. 5–6; H. Rept. 715, 65th Cong., 2d sess., pp. 13–14; 59 Cong. Rec. 244, 7729, 7733; 58 Cong. Rec. 2020, 2026; 57 Cong. Rec. 4637, 4638; 56 Cong. Rec. 8916, 8929, 9038–9039, 9110, 9660, 10474, 10485, 10634, 10636–10638, 10640–10645.[*] Com-

[*] The jurisdictional conflict between those committees supervising public lands and forest reserves, on the one hand, and interstate and foreign commerce, on the other, had delayed the 1920 legislation. See H. Rept. 61, 66th Cong., 1st sess., pp.

merce with the Indians was never contemplated as a constitutional head of jurisdiction for the Power Act.

C. *Compensation for Federal Lands and Indian "Reservations".* Moreover, the Power Act's plan of compensation for lands used in licensed projects is explicable only if the term "reservation" in the Act is limited to real property interests of the United States. The Power Act provides two methods of payment. Under Section 21, 16 U.S.C. 814, licensees are authorized to acquire by condemnation, in federal or state court proceedings, all lands and properties necessary for the licensed development. However, this exercise of eminent domain does not apply to lands or properties owned by the United States. For Section 10(e), 16 U.S.C. 803(e), states that, among other items, "the licensee shall pay to the United States reasonable an-

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3–4; S. Rept. 180, 66th Cong., 1st sess., p. 5; H. Rept. 715, 65th Cong., 2d sess., pp. 13–15; See 56 Cong. Rec. 10636–10638, 10640–10645. The two sources of federal authority were also pointed out in the Senate's request to a subcommittee of its Judiciary Committee, for a report on the authority of the Federal Government over the development of water power, and, specifically, whether it could impose certain conditions on use of nonnavigable streams, navigable streams and "in disposing of any of its lands, reserved or unreserved". Among other conclusions the subcommittee affirmed the Government's full power as owner of its lands. S. Doc. 246, 64th Cong., 1st sess., pp. 7, 19–20.

As passed in 1920, the commerce part of the Commission's jurisdiction was limited to licensing "across, along, from or in any of the navigable waters of the United States" (Section 4(d), 41 Stat. 1063). In 1935, this was amended to its present form, quoted *supra*, p. 64, extending to the full interstate and foreign commerce power over streams, without limitation to navigability (the Section was then renumbered 4(e), 49 Stat. 838).

nual charges * * * for recompensing it for the use, occupancy and enjoyment of its lands or other property" (*infra*, pp. 81–82).

The provision in Section 10(e) for annual payments to the United States for "*its* lands or other property" was, furthermore, clearly intended by Congress to cover all Indian lands which fall within the Act's definition of "reservation". For, at all times, the first proviso to Section 10(e) has set forth a special condition governing the annual charges to be paid to the United States for "tribal lands embraced within Indian reservations."[50] The quoted phrase is taken

[50] At present, the Section 10(e) proviso distinguishes "tribal lands embraced within Indian reservations" from other Government lands by fixing minimum intervals for the readjustment of charges for Indian lands and, in addition, making the amount of the annual charge subject to the approval of the Indian tribe concerned if the tribe has organized under the Wheeler-Howard Act of 1934 (the Tuscarora Nation has not so organized). The proviso also establishes parallel conditions on charges for the use of Government dams and other federal structures.

The original proposal for specification of items to be paid the United States came from the Senate Committee on Commerce in 1919, which sought to limit administrative discretion and, at the same time, assure that "the Government will be fully reimbursed * * * for the use of its property" (among other things). The Senate amendment prescribed charges "for the use and occupation of any public lands and lands in reservations * * * based upon the actual value of the Government lands used", with an exception for "tribal lands embraced within Indian reservations" (and Government dams and structures) which had the effect of permitting any reasonable charge for use of them, while charges for other "public lands and lands in reservations" were subject to a maximum. S. Rept. 180, 66th Cong., 1st sess., pp. 1–2, 14. As enacted, the description of Government lands or property was put in its present form and the only difference for Indian lands and Government dams was a

from the definition of "reservation" in Section 3(2), *supra*, p. 59. Since this Section 10(e) proviso follows upon and modifies the requirement at the beginning of Section 10(e) for an arrangement with respect to *Government* lands and property, it follows that, to qualify as such "reservation", the Indian lands referred to by Congress must be or include Government property.

This distinction between the two methods of compensation in the Power Act—for federal property and for non-federal property—rests on the fact that, with respect to lands already owned by the United States, no condemnation is necessary to obtain fee title and to make them available for hydroelectric development. But that policy would not extend to the Tuscarora lands in suit, nor to other Indian lands in which the Government has no property interest. The appropriate method under the Power Act for forcibly acquiring such lands, or interests in them, is by a condenmnation proceeding, and full eminent domain compensation would have to be paid.[51] Indeed, the pay-

minimum interval for readjustment, the first condition in the present proviso, 41 Stat. 1069; H. Rept. 910, 66th Cong., 2d sess., pp. 3–4, 9; S. Doc. 269, 66th Cong., 2d sess., pp. 3–4. The second condition was added in 1935 (49 Stat. 843), when the Water Power Act was generally amended and became Part I of the Federal Power Act.

[51] This plan of compensation for lands is specific to the Federal Power Act. Congress, of course, has the same constitutional power to administer all Indian reservations regardless of the state of the title. Our point is only that in the Power Act it made a distinction between the treatment of Indian reservations, depending upon the title interest of the United States.

When condemnation is required under the Federal Power Act, as in this case, the interest taken should be that interest best adapted to both the execution of the project and the protection of the rights of the Indians.

ment of full compensation in this case would enable the Nation to replace entirely the lands used for the Niagara Project and thus would appear more advantageous to it. Just as the Tuscarora lands are subjects of condemnation, not of annual charges, so these lands are not "tribal lands embraced within Indian reservations" requiring special treatment under the proviso to Section 4(e).

D. *The Power Act's Use of "Reservation" and General Indian Law.* Against this compelling evidence of the meaning of the Federal Power Act, it will not do to insist that, ordinarily, no distinction is made between Indian "reservations", and that the term has only one possible meaning.

Equal treatment and consistent characterization have not been the undeviating rule. Respondent and the Court of Appeals have adduced only the statutory restraint upon alienation, which applies to all types. R. 429–431; Brief in Opposition, pp. 24–25. But, on the other hand, the term "reservation" is sometimes used to include allotted lands, sometimes not. See *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 214–217. In an appropriate case, the words "public lands" are construed to include Indian reservations on such lands. *Nadeau* v. *Union Pacific R.R. Co.*, 253 U.S. 442, 444. Respondent has also ignored the General Allotment Act of 1887, which set the pattern for Indian relations until 1934, and which authorized allotment in severalty—not of all Indian reservations—but only of those created by treaty, Act of Congress, or Executive Order. Section 1, 24 Stat.

388, as amended, 25 U.S.C. 331. The Act did not extend to reservations created by purchase, like the respondent Nation's (R. 354; Exhibit 250, R. Ex. 234–238; Tr. 5219–5220, 5376. The Tuscaroras have indeed allocated their lands into individual holdings (as its members testified—R. 55–56, 69, 198–199, 204; Exhibit 235, R. Ex. 208) but this was accomplished under specific authority of New York law, N.Y. Indian Law (25 McKinney's Consol. Laws), Sec. 95.[52] Finally, in the federal allotment process, Congress has on occasion used retention of title in the United States as a criterion for the continuation of regulatory restrictions. *E.g., United States* v. *Nice*, 241 U.S. 591, 595, 599–60.

The Federal Power Act, at the outset, gives notice that it employs a special meaning of "reservation" with respect to Indian lands. It includes only "tribal lands", not allotted lands, within its definition; and a further distinction was made, separating Indian reservations in which the United States owns trust title (or other real property interest) from other reservations. This special rule for the Power

[52] If the Tuscaroras had allotted their lands under the federal statute, the lands of the individual members would be excluded from the Power Act definition of reservation (not being "tribal lands") and would also be generally subject to condemnation, like any private lands, under the express terms of 25 U.S.C. 357. Nearly all the land sought for the reservoir consists of individual holdings allocated under state law, with certain rights of testamentary and inter vivos disposition enforceable in the New York courts. The Tuscaroras have urged, nevertheless, that all the members' lands continue to be "tribal lands" for federal purposes, and that they may enjoy the advantage of both statutes at the same time. *E.g.*, Tr. 5376–5378.

Act is demonstrated, as we have shown, by the Act's definition of "reservation", by the jurisdictional bases for licensing projects, by the Act's compensation provisions, and by its history. In the light of the development of the Power Act, there was ample reason for Congress to formulate such a special meaning of "reservation" in that Act—which controls here, and requires reversal of the decision below.

III

EVEN IF THE DECISION BELOW WAS CORRECT WITH RESPECT TO THE TUSCARORA LANDS, THE JUDGMENT WAS IMPROPER SINCE IT DIRECTED THE AMENDMENT OF A LICENSE BY THE FEDERAL POWER COMMISSION.

As we have shown, the Court of Appeals erroneously invalidated the license issued to the Power Authority to the extent that the license authorized the condemnation of the lands of the Tuscarora Indians. This error was compounded when the court remanded the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes" (R. 533).

As this Court held in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21, the power of the Court of Appeals "to affirm, modify, or set aside" a Commission order "in whole or in part" does not authorize it to exercise "an essentially administrative function". Its function ends when an error of law is

laid bare; the matter must then be returned to the agency for reconsideration.

The order below in effect compels the implementation of a modified license. But under established law it was not up to the Court of Appeals to determine whether, and to what extent, the Project should proceed if Indian lands may not be taken. Ordinarily, the Commission (under Section 10(a) of the Power Act, *infra*, p. 81) would have to decide whether a project with a smaller reservoir is still "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *". This is "an administrative, not a judicial, decision." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. at 21. In this case, the problem is accentuated by the fact that Congress itself had made the initial decision to launch a Niagara Project of the fullest scope, which the decision below will prevent. We submit that the Court of Appeals should have gone no further than to remand the case to the Commission for its further consideration in the light of the court's decisions and the Congressional enactment.

CONCLUSION

For these reasons, the judgment below should be reversed for the grounds set forth in either Point I or Point II, and this Court should sustain the Commission's issuance of a license for the full development of Niagara power including the taking of Tuscarora lands

necessary for the purpose. If the decision below on the Tuscarora lands was correct, the judgment below should be modified as prayed in Point III.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

1. Public Law 85–159, approved August 21, 1957, 71 Stat. 401, provides:

> AN ACT To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.
>
> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:
>
> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any

case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance

the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

* * * * *

2. The pertinent provisions of the Federal Power Act, 49 Stat. 838, as amended, 16 U.S.C. 791a, *et seq.*, are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies or water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations

and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoy-

ment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * *

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK

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October 16, 1959.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK

Opinion Below

The opinion of the Court of Appeals on November 14, 1958 (R. 422) is reported at 265 F. 2d 338. This opinion was rendered at the time of interlocutory holdings by which it remanded the case to the Federal Power Commission and retained jurisdiction. There was no opinion at time of final judgment of March 24, 1959 rendered subsequent to the Commission's report of its hearings, opinion and findings on remand (265 F. 2d 344).

Jurisdiction

The jurisdiction of this Court rests on Section 313(b) of the Federal Power Act and 28 U. S. C. § 1254(1). The order and judgment of the Court of Appeals was entered on March 24, 1959 (R. 532-533), 265 F. 2d 344. The petition for certiorari was filed on May 13, 1959 and granted June 22, 1959. A petition for certiorari was likewise granted on June 22, 1959 in the companion case No. 63, *Federal Power Commission* v. *Tuscarora Indian Nation*, and the two cases were consolidated (R. 533-534).

Constitutional Provisions, Treaties, Statutes and Orders Involved

The case involves:

1. United States Constitution, Article I, § 8, and Article IV, § 3.

2. Treaty between the United States and Canada concerning uses of the waters of the Niagara River (1950), 1 U. S. T. 694.

3. Niagara Redevelopment Act (Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a).

4. Federal Power Act (49 Stat. 838, 16 U. S. C. § 791a et seq.), §§ 3(1), 3(2), 4(e), 10(a), 10(e), 21, 23(b), 24, 313(b).

5. Act of June 30, 1834, 25 U. S. C. § 177, 4 Stat. 730.

6. Act of September 13, 1950, 25 U. S. C. § 233, 64 Stat. 845.

The most pertinent parts are set forth in Appendix A of this brief.

Questions Presented

The questions presented arise out of the following circumstances:

Congress directed the Federal Power Commission to issue petitioner a license for a power project with capacity to utilize all the water of the Niagara River available to the United States under international agreement (Niagara Redevelopment Act, Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a). The Federal Power Commission issued such a license. The license included a storage reservoir of 60,000 acre foot capacity, the capacity represented to Congress and found by the Commission to be necessary for full utilization of available water. The reservoir as licensed and necessary transmission lines and roads around it would occupy 1,383 acres of respondent's 6,249-acre reservation.

The order and judgment appealed from provides that "the license * * * is approved except insofar as it would authorize the condemnation of Tuscarora Indian tribal land for reservoir purposes" and directs the Federal Power Commission "to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes" on the ground—stated therein—that the Commission failed to make the finding required by § 4(e) of the Federal Power Act in the case of reservations of the United States that the license would not interfere or be inconsistent with the purpose for which respondent's reservation was created or acquired.

The questions are:

1. Does respondent's land needed for the Niagara Project constitute part of a "reservation of the United States" within the meaning of § 4(e) of the Federal Power Act—even though: (i) it was not reserved to respondent or otherwise established by any treaty, executive order or statute of the United States, but on the contrary was acquired

in fee simple by purchase from non-governmental, non-Indian private owners; (ii) the United States does not have and never has had any property interest in it; (iii) no statute authorizes any department of the United States Government to exercise supervision of it; and (iv) possession and use of virtually all the land is not in the Tribe but rather in individual members to whom it has been allotted under State law?

2. Assuming arguendo, however, that respondent's land needed for the project in order for it to have capacity to utilize all the water of the Niagara River available to the United States under international agreement does constitute a part of "a reservation of the United States" within the meaning of § 4(e), was the requirement of § 4(e) "that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" superseded by the Niagara Redevelopment Act which specifically directed the Commission to issue a license to petitioner for a project capable of using all the Niagara water available to the United States?

3. Should respondent have been allowed to relitigate in the District of Columbia Circuit Court of Appeals issues determined by the Court of Appeals for the Second Circuit in an action (i) brought by respondent in a forum of its own choice prior to institution of review proceedings in the District of Columbia Circuit and (ii) progressed to judgment in a Second Circuit District Court before the District of Columbia Court of Appeals obtained jurisdiction through the filing by the Federal Power Commission of a transcript of its proceedings?

4. Did the District of Columbia Circuit Court of Appeals usurp congressional and administrative authority in directing the Commission without further administrative proceedings to amend its licensing order to exclude the power of petitioner to condemn respondent's land for reservoir purposes?

STATEMENT

I

The Licensing of the Niagara Power Project

The Niagara Power Project now being constructed by petitioner, Power Authority of the State of New York, resulted from (i) the 1950 treaty between the United States and Canada (1 U. S. T. 694) which allows each country to divert greater amounts of water from the Niagara River for power purposes than previously allowed by international agreement and (ii) the Niagara Redevelopment Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836-a) which directed the Federal Power Commission to issue a license to the Power Authority for a project "with capacity to utilize all of the United States' share of water of the Niagara River permitted to be used by international agreement."

The Niagara power project will be the largest hydroelectric project in the United States (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888). When completed in 1963 at a cost of about $720,000,000 it will produce an average of 13 billion kilowatt hours of electricity a year. It is designed to have a firm capacity of 1,800,000 kilowatts and a total capacity of 2,190,000 kilowatts (R. 226, 278, 440, 460, Exh. 191, E. R. 40, R. 120, Exh. 218, E. R. 132, R. 248).*

The project will consist of an intake structure at the edge of the Niagara River about three miles above the Falls; a waterway consisting of twin covered conduits extending from the intake about four miles through the City of Niagara Falls and the Town of Niagara to a forebay and

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* Citations to the printed record are designated "R."; to the separately bound exhibit volume "E. R."; to the original record "O. R."

pump-generator plant in the Town of Lewiston; a storage reservoir adjacent to the pump generator plant with a capacity of 60,000 acre feet (if part of respondent's land can be acquired for the project); an open waterway approximately 250 feet wide extending from the pump generator plant forebay to the forebay of the main generating plant, which is on the edge of the river about five miles below the falls (R. 392, 401-2, 416).

A storage reservoir of at least 60,000 acre feet is essential to make practical use of all the water available and to keep part of it from going to waste. The project was designed so that the bulk of its energy output would be produced for a 17-hour period, five days a week when power is most needed and most valuable. This requires that during the night time and on weekends the bulk of the water be pumped into the reservoir for use during the 17-hour peaking periods. The 1,800,000 kilowatt firm power capacity which the project is designed to have and which Congress understood it would have, is a capacity to produce 1,800,000 kilowatts 17 hours a day, 5 days a week (R. 224-231, 461; Exh. 218, E. R. 132, R. 248; H. Rep. 862, 85th Cong. 1st Sess. p. 7, 104 Cong. Rec. 14,444). A factor which makes the reservoir completely essential under any power-marketing scheme is that the 1950 Treaty makes more water available for power (50,000 cubic feet per second for division between the United States and Canada) at night than in the day during a tourist season of 7 months so that in that season more water will go over the Falls in the daytime for scenic purposes (1 U. S. T. 694, 697).

The first power from the project is scheduled to be produced in February 1961 (R. 277). The project is being built in the shortest possible time in order to alleviate the critical shortage of power on the Niagara frontier caused by the destruction in 1956 of the Niagara Mohawk Power Corporation's Schoellkopf station which for many years had used a good part of the Niagara River water and supplied low-cost power to the electrochemical and electrometallurgical industries upon which the economy of the area

was based. The disaster created a power emergency on the Niagara frontier which was recognized by both Houses of Congress when the Niagara Redevelopment Act was passed (R. 278-279; S. Rep. 539, 85th Cong. 1st Sess.; H. Rep. 862, 85th Cong. 1st Sess.).

The Senate's consent to ratification of the 1950 treaty was conditioned upon a reservation providing that no project to develop the United States' share of the additional water could be undertaken "until it be specifically authorized by Act of Congress" (1 U. S. T. 694, 699). Accordingly, beginning in 1950 bills were introduced in each Congress variously calling for development by the Power Authority, by private utility companies and by the Federal government. No bill had been passed up to June 6, 1956 when a rock slide virtually destroyed the Schoellkopf generating plant. (Exh. 248, F. R. 131)

In August 1956 petitioner, a public corporation established by New York law to develop the St. Lawrence and Niagara Rivers for power, applied to the Federal Power Commission pursuant to § 4(e) of the Federal Power Act for a Niagara license, contending that the reservation to the 1950 treaty was invalid because it did not involve a subject of international concern and that, therefore, specific enabling legislation was not necessary. The Commission dismissed the application, but on appeal the United States Court of Appeals for the District of Columbia Circuit set aside the dismissal, reinstated the application and remanded the case to the Federal Power Commission. *Power Authority of the State of New York* v. *Federal Power Commission*, 247 F. 2d 538 (D. C. Cir. 1957).

Obviously spurred on by that decision and by the power emergency facing the Niagara frontier, in August, 1957 Congress passed the Niagara Development Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836-a) directing the Federal Power Commission to issue a license to the Power Authority for a project to use all water of the Niagara River available to the United States for power,

including the water made available for the first time by the 1950 treaty and water used by Niagara Mohawk under prior international arrangements.

The Power Authority promptly amended its application to the Federal Power Commission to bring it under the new law and in September the Commission issued it a license but deferred making decisions on objections to the type of waterway and size and location of the storage reservoir interposed by local municipalities (R. 393-394). It held hearings on these objections. While the hearings were in progress the Tuscarora Indians also objected to the location of the reservoir (R. 393-395).

The storage reservoir, the size and location of which was shown on material submitted to Congress and to the Commission, required some Tuscarora land. The Tuscarora claimed that treaties barred the taking of any of their land. Members of the Tuscarora Nation testified at the Federal Power Commission's hearings. The Nation intervened formally in the proceeding and filed a brief through counsel (R. 393-395; 419; Exh. 212, E. R. 118).

While the hearings on the objections were pending, this Court vacated as moot the judgment of the Court of Appeals for the District of Columbia Circuit which had reinstated the application for a Niagara license which the Power Authority had made pursuant to §4(e) of the Federal Power Act prior to the passage of the Niagara Redevelopment Act. This Court took this action despite the fact that the Power Authority pointed out that the license already issued was based upon the original application as amended to conform with the 1957 act (*American Public Power Association, et al.* v. *Power Authority of the State of New York*, 355 U. S. 64).

On January 30, 1958, the Commission issued the Authority a superseding license and approved a storage reservoir of the size and capacity proposed by the Authority in its representations to Congress and in drawings submitted to the Commission (R. 391 *et seq.*).

The Commission's January 30 order directed that some changes be made in the waterway proposed in the Authority's application. The Commission refused to order any changes in the reservoir and expressly declined to decide the question of whether the Power Authority could condemn Tuscarora land. It said "* * * we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive" (R. 395). (The Commission had taken no evidence with respect to the availability of alternate lands.)

The Commission did not approve Exhibit J to the Authority's license application, which showed both the waterway and the storage reservoir. That Exhibit J showed a reservoir of the size and location represented to Congress (Exh. 18, E. R. 11; Exh. 191, E. R. 35-44). It included approximately 1,300 acres of Tuscarora land (*id.*). The Commission's order directed the Authority to file for approval by July 1, 1958 a revised Exhibit J which would show the waterway as the order directed it to be built and also show the reservoir (R. 404, 409).

On February 28 the Tuscarora applied for rehearing on the January 30 order and for the first time argued that § 177 of Title 25 U. S. Code forbade the use of their land for project purposes and also argued for the first time that the license was invalid as to their land because the Commission had not made a finding required by § 4(e) of the Federal Power Act in connection with the licensing of projects on "reservations of the United States" that the license would not interfere or be inconsistent with the purpose for which the reservation was created or required. They asked that the license be amended to exclude their land (R. 412-414).

The Commission denied the application for a rehearing on March 21, 1958 and in doing so held that Tuscarora land (in which, unlike lands in the west, the United States has no property interest, R. 339, 366) did not constitute a

reservation of the United States within the meaning of § 4(e). It held that "the best location of the reservoir" required Tuscarora land and that the Authority's right to condemn the land was for a court to decide (R. 412-413).

On May 5 the Commission approved a revised Exhibit J submitted by the Authority (R. 418). It showed that the reservoir would be located in such a way as to take in 1,383 acres of Tuscarora land—somewhat more than on the previous Exhibit J which had been before the Commission when it held its hearings and issued its January 30 order (R. 416). (The new reservoir plan was based on surveys of the area adjoining the reservation which the Authority had not made at the time of the January 30 order.)* All the Tuscarora land shown on the new Exhibit J was owned by the Nation in fee as a result of purchase from non-Indian non-governmental owners and almost all of it was allotted under State law and tribal custom to individual members of the Nation. *Tuscarora Nation of Indians* v. *Williams*, 79 Misc. 445; N. Y. Indian Law, § 95 (R. 339, 366, 370-376).

II

History of the Litigation

Meanwhile, all its efforts to negotiate with the Tuscarora for the purchase of their land having failed, the Authority in April undertook to acquire these 1,383 acres of land by eminent domain (R. 110-119; Exh. 181, E. R. 25, R. 115). It acted under § 21 of the Federal Power Act which authorizes a licensee to acquire land needed for a power project by eminent domain in the State or Federal courts and under Section 1007 of the New York Public Authorities Law and Section 30 of the New York High-

* Petitioner was not permitted to survey respondent's land until late July, 1958.

way Law. The procedure followed involved taking land in the name of the State through the State Superintendent of Public Works' filing a map in the office of the Clerk of Niagara County, who is also the Clerk of the Niagara County Court and the Supreme Court of Niagara County. Under the State law title passes upon the filing of a map, but to obtain possession against the consent of the owner, subsequent court proceedings are necessary (in which the validity of the taking may be challenged) and damages (unless agreed upon) are determined by the State Court of Claims. This method of exercising eminent domain is called appropriation.

The Tuscarora thereupon brought an action in the United States District Court for the Southern District of New York (1) *permanently* to enjoin petitioner from "taking any actions" to acquire by appropriation lands belonging to the Tuscarora, or from entering upon such lands; (2) for a declaratory judgment that petitioner had no right, authority or power to acquire *"by appropriation or otherwise"* any lands belonging to the Tuscarora; and (3) for an order setting aside and vacating all descriptions, maps, notices and other instruments "in connection with the purported appropriation" of Tuscarora's property.

On June 24, 1958 the United States District Court for the Western District of New York (to which the action had been transferred as a local action) dismissed the complaint on the merits (*Tuscarora Nation* v. *Power Authority*, 164 F. Supp. 107 mod. 257 F. 2d 885, reh. den. 257 F. 2d 895, cert. den. 358 U. S. 841 (1958), reh. den. 360 U. S. 923 (1959)).

While the action for an injunction and declaratory judgment was pending in a Second Circuit District Court, the Tuscarora on May 16 petitioned the Court of Appeals for the District of Columbia Circuit to review the January 30 order of the Federal Power Commission. They waited 56 of the 60 days allowed by law to file a petition and then elected to do so in the District of Columbia Circuit rather than in the Second Circuit in a district of which litigation

brought by them and involving the same issues was pending.*

The Authority intervened as a party in the review proceeding.

On June 25—the day after judgment against the Tuscarora was entered by the District Court in the Second Circuit action—the Commission certified and filed with the District of Columbia Court of Appeals a transcript of the record upon which its January 30 order was based.

On July 24 the United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court in so far as it held that the Power Authority has the right to exercise eminent domain over Tuscarora land pursuant to § 21 of the Federal Power Act and entered a declaratory judgment to that effect. It held that Congress through the 1957 Niagara Redevelopment Act had consented to the use of Tuscarora land for the project. However, it held that New York State's exercise of an inherent sovereign power of eminent domain over Indian land—something it had been doing with judicial approbation since 1775—was repugnant to 25 U. S. C. §§ 177 and 233 and that therefore the Authority's right to take the land was based solely on the 1957 Act and the Federal Power Act. With Judge Swan dissenting, the Court set aside the documents used by the State to exercise eminent domain over the land on the ground that the procedure used did not conform to § 21 of the Federal Power Act which provides for the exercise of eminent domain in Federal or State courts.

The Court of Appeals requested the District Court in the event a condemnation proceeding was started there to expedite proceedings as much as possible (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885).

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* They took no steps to obtain a review of the May 5 order which by its terms was to become final unless objected to within 30 days and which was the only order of the Commission which included their lands among those licensed for the project and thus the only order which actually aggrieved them. See R. 418.

The Authority immediately started such an action in the United States District Court for the Western District of New York.

The Tuscarora petitioned the Second Circuit Court of Appeals for rehearing, contending for the first time that only the District of Columbia Circuit had jurisdiction to settle the basic dispute between the parties. They made this contention despite the fact that three days after filing their review petition in the District of Columbia Circuit, they had submitted a memorandum to the District Court in New York sustaining that Court's jurisdiction to decide those issues. In their brief in the Second Circuit Court of Appeals Tuscarora argued that their land could not be taken unless a finding was made pursuant to §.4(e) of the Federal Power Act and that in the absence of such finding the license was void as to their land. They asked the Second Circuit Court to reverse itself and if it refused to do so to hold up all proceedings pending decision by the District of Columbia Circuit in the review proceeding. The Second Circuit denied the applications and cancelled a stay which had precluded the Authority from entering upon Tuscarora land except for the purpose of making surveys. It also refused to grant a stay pending application for a writ of certiorari. (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 895).

The New York State Superintendent of Public Works, who was a defendant in the Second Circuit action, appealed to this Court from so much of the judgment of the Court of Appeals as denied the State's inherent power to acquire Tuscarora land by eminent domain and as held that appropriation was not a proper method of exercising eminent domain pursuant to § 21 of the Federal Power Act. That appeal is pending. (Oct. 1959 Term, No. 4).

The Tuscarora sought a stay of the Court of Appeals mandate from Mr. Justice Harlan pending decision on petition for certiorari. On September 8 Mr. Justice Harlan denied a stay of the mandate but in effect stayed condem-

nation proceedings in the District Court except with respect to land immediately necessary for the building of transmission lines. (*Tuscarora Nation of Indians* v. *Power Authority*, 3 L. Ed. 2d 40).

On September 15 the District Court for the Western District of New York, Burke, J., granted the Power Authority immediate possession of approximately 85.6 acres of Tuscarora land for the purpose of erecting the transmission lines.

On October 13, 1958 this Court denied a Tuscarora petition for certiorari to the Second Circuit Court of Appeals. On the same day this Court also denied the Tuscarora request for a stay of all proceedings in the District Court for the Western District of New York pending a decision by the Court of Appeals for the District of Columbia Circuit on its review of the order of the Federal Power Commission. As a result of this Court's October 13 decision the stay granted by Mr. Justice Harlan by its terms came to an end. (*Tuscarora Nation of Indians* v. *Power Authority*, 358 U. S. 841)

On October 29 the Western New York District Court granted the Authority possession of all the remainder of the Tuscarora land needed for the Niagara Project except for areas within 200 feet of dwellings. The September 15 and October 29 orders were conditioned upon deposits in Court of a total of $2,000,000. (R. 284-287).

The Authority proceeded to carry on construction work on Tuscarora land. It built high voltage transmission lines to replace existing lines which had to be taken down in another part of the project and were urgently needed. These new lines have been in use since early 1959 (R. 277). The Authority also proceeded to divert creeks, dig drainage ditches and do other work preliminary to the building of dikes. It did not disturb any dwellings or land around them. (R. 277; Exh. 224, O. R. 8251; Exh. 225, O. R. 8252; Exh. 226, O. R. 8253).

On November 14 the court below rendered a decision holding that Congressional consent was necessary for the use of Tuscarora land for the project, that the 1957 Niagara Redevelopment Act did not contain such consent, that the Federal Power Act did contain such consent but that it was conditioned upon the Commission's making a finding pursuant to §4(e) that the license would not interfere or be inconsistent with the purpose for which the reservation was created or acquired. It remanded the case to the Commission to explore the possibility of making such a finding and directed it to report to the court. The court retained jurisdiction (R. 422-432).

Beginning November 24 the Commission held exhaustive hearings pursuant to the Court's remand. The evidence presented included testimony concerning the circumstances under which the Tuscarora reservation was established, the relationship of the United States to the reservation both at the time it was established and subsequently, the nature of the ownership of the Tuscarora land needed for the project, the number of Tuscarora and other Indians now living on the reservation, the number of white people now living illegally on the reservation, the amount of reservation land actually being used, the purposes for which it is being used, the methods by which the residents of the reservation who work earn their livings, the relationship of New York State to the reservation and the fact that it rather than the United States supplied the residents with education, health services and welfare benefits, and the failure of the United States to exercise supervision over the reservation (*infra*, pp. 18-32).

The Commission also received evidence concerning the practical need of Tuscarora land for the Niagara Project, the impossibility of building a reservoir of the size required without using reservation land, and the legislative history of the 1957 Niagara Redevelopment Act (*infra*, pp. 33-42).

On February 2, 1959, the Commission made a finding that the use of 1,383 acres of Tuscarora land would interfere and be inconsistent with the purpose for which the reserva-

tion was created or acquired. This holding was directly contrary to the recommendations of the Commission's staff (R. 445-447). Two Commissioners vigorously dissented (R. 486-494).

The Commission unanimously reaffirmed its January 30, 1958 holding that a reservoir of the capacity proposed by the Authority—60,000 acre feet—is required to utilize all of the Niagara water available to the United States under international agreement as required by the 1957 Niagara Redevelopment Act. It found without dissent that it would be impractical to build a reservoir of that size without the use of Tuscarora land and that removing the reservoir from those lands and reducing its size from 60,000 acre feet to 30,000 acre feet would result in a loss of about 300,000 kilowatts, a reduction of about one-sixth in the total dependable capacity of the project (R. 486-494).

On February 25 the Commission—again by a 3 to 2 vote—denied the Authority's application for rehearing. The majority refused a request contained in the rehearing application that it consider whether or not the use of a smaller amount of land than 1,383 acres would interfere or be inconsistent with the purpose for which the reservation was established. The majority held that a formal application for an amendment of the license was necessary before it could do so (R. 495-512).

The Commission reported its findings to the District of Columbia Court of Appeals and joined the Authority in petitioning the Court for reconsideration of its November 14 interlocutory holding.

The United States, through the Department of Justice, petitioned the Court of Appeals for leave to participate in the review proceeding as amicus curiae, for leave to file a motion that the Court reconsider its November 14 interim holding, and for oral argument on the motion.

On March 24, 1959 the Court granted the United States leave to participate as amicus curiae but denied the motions

of the United States, the Federal Power Commission and the Power Authority for reconsideration (R. 531).

Also on March 24 the Court entered the order and judgment under review approving the license "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes". It remanded the case to the Commission "with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes". It stated in the order that the ground upon which it was made was the failure of the Commission to make a finding under § 4(e) of the Federal Power Act. It made no mention of transmission lines (R. 532-533).

Petitions for certiorari to the Court of Appeals for the District of Columbia Circuit were filed by the Solicitor General of the United States on May 12 and by the Power Authority on May 13. On May 21 the Tuscarora Nation of Indians submitted (i) a motion for leave to file a petition for rehearing on this Court's denial of its petition for certiorari to the Court of Appeals for the Second Circuit in the declaratory judgment action; (ii) a petition for such rehearing in which it asked this Court to grant certiorari to the Second Circuit in the event that it granted certiorari to the District of Columbia Circuit; and (iii) a motion to substitute John Burch McMorran, the new Superintendent of Public Works of the State of New York for his predecessor, John W. Johnson, in the Superintendent's appeal from part of the Second Circuit judgment. (The Attorney General of the State of New York had made a similar motion to substitute McMorran for Johnson on April 29, 1959.) On June 22 this Court granted both petitions for certiorari to the Court of Appeals for the District of Columbia Circuit and granted the motion to substitute McMorran for Johnson. It denied the Tuscarora motion for leave to file a petition for rehearing with respect to denial of certiorari to the Second Circuit (*Tuscarora Nation of Indians* v. *Power Authority* 360 U. S. 923).

Immediately after the Commission made its February 2 finding, the Authority ceased operations on the reservation except for some final work on the transmission lines and some cleaning up. It is now engaged in building the reservoir up to the Tuscarora line. In the event that this Court decides Tuscarora land may be taken, it will extend the reservoir on to Tuscarora land. In the event that this Court decides Tuscarora land may not be taken, the Authority will have to close in the reservoir along the border line. This would reduce the capacity of the reservoir and the power capacity of the project.

III

Origin and History of the Tuscarora Reservation

The Tuscarora Reservation consists of approximately ten square miles (6,249 acres) on the outskirts of the City of Niagara Falls, New York, a city of about 100,000 people. It is in the largely urban part of the Town of Lewiston adjoining the city. It is between two and three miles east of the point on the Niagara River where the Authority's main generating plant is being built. This plant is about 5 miles downstream from the Falls (see map in the centerfold of this brief and Exh. 190, E. R. 33; Exh. 191, E. R. 42-43).

The Reservation consists of three parts designated as Parcels A, B and C on the centerfold map. The land needed for the Niagara Power Project is the shaded part of Parcel C.

The Tuscarora migrated from North Carolina to Central New York State before the Revolution and lived there many years with the Oneida, who held sway in that area, approximately 200 miles east of their present reservation in Niagara County. The Tuscarora had no territory of their own. Their relationship to the Oneida has been

variously described as "tenants at will or by sufferance" and "guests" (Exh. 233, Hough, *Census of the State of New York*, (1857), p. 510; Exh. 241, E. R. 220; N. Y. Sen Doc. No. 24, 1846, p. 68).

They were, however, accepted as members of the Five Nations which then became known as the Six Nations. The others in addition to the Oneida were the Mohawks, the Onondaga, the Cayuga and the Seneca.

The Seneca occupied a vast area in Western New York, including all of what is now Niagara County except a four mile strip on the west parallel to the Niagara River which they ceded to the King of England at two treaties held in 1764 (London Documents, Vol. XXXVII, p. 621; *id.* p. 652).

A few Tuscarora fought with the Seneca on the side of the British and after they were defeated at the Battle of Elmira in 1779 went to the neighborhood of Fort Niagara which the British held until 1796. There they were under the protection of and received rations from the British (R. 343-348; Exh. 241, 242, E. R. 220, 221).

There came a time, perhaps as early as the 1780's, when a few Tuscarora settled on the square-mile area shown as Parcel A on the centerfold map (Exh. 239, E. R. 217). This is located about 6 miles south-east of Fort Niagara. Historical accounts differ as to the time of the settlement and there are no contemporary documents which fix it. The most that can be said with certainty is that they were there prior to 1797. The Tuscarora had the same kind of tenure there with the Seneca as their kinsmen had with the Oneida in Central New York. They were described by one of their own chiefs as "squatters upon the territory of another distinct nation" (Exh. 233, *loc. cit*).

The United States in the 1784 Treaty of Fort Stanwix (7 Stat. 15) and the unratified 1789 Treaty of Fort Harmar (7 Stat. 33), both with the Six Nations, specifically promised to hold the Oneida and the Tuscarora secure in the lands upon which they then lived which were in Central New York. By the same treaties the United States promised

to secure to the Six Nations a tract of land in Western New York, east of a line parallel to and approximately 4 miles east of the Niagara River and running its full length from Lake Erie to Lake Ontario as shown on the centerfold map. All the land west of that line (the northern half of which had been ceded by the Six Nations to the King in April 1764*) was acknowledged to be under United States as distinguished from Indian Control. As the map shows, Parcel A was west of the line and hence no possible Indian claim to it was protected by the 1784 and 1789 treaties. (R. 342-347).

The 1794 Treaty of Canandaigua (7 Stat. 44) between the United States and the Six Nations superseded the prior treaties and specifically recognized that the Seneca Indians and only the Seneca Indians had possessory rights to the Western New York area. The 1794 Treaty brought a change in the boundary between the United States and the Indians by restoring the April 1764 boundary line. Under that Treaty with the King and now under the 1794 Treaty with the United States, the westward line of the Seneca's possessions was acknowledged to be the Niagara River for about half the distance from Lake Erie northerly toward Lake Ontario. Along the northern half of the River beginning at the point where Gill Creek runs into it a line was drawn to a point on Lake Ontario about 4 miles east of Fort Niagara and this line constituted the westward boundary in the area. As a result of the 1794 Treaty all the land within the present Tuscarora Reservation, including Parcel A, was secured to the Seneca. There is some confusion in the Treaty as to the exact location of the line. The location most favorable to the Seneca is shown on the centerfold map. (R. 347-351; Lon. Doc. XXXVII, 621, 652).

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty and Massachusetts to own the underlying fee and

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* A second treaty between the King and the Seneca, concluded in August 1764 appears not to have applied to any of the land involved in this litigation (London Doc. XXXVII, p. 652).

the right to buy out the Seneca's interest with respect to their territory, except for a strip one mile wide along the Niagara River. All rights which had been derived from the King to this strip along the whole length of the River between Lake Erie and Lake Ontario were conceded to be in New York. All of the islands on the United States side of the international boundary, both in the southern and northern halfs of the River were acknowledged to belong to New York (R. 315-317).

By 1794 Massachusetts had sold the fee and preemptive rights in the westerly part of its land including that which was in what is now Niagara County to Robert Morris who in turn had sold it to the Holland Land Company with the understanding that he would buy out the Seneca's rights on its behalf. At Big Tree in 1797 Morris, with the approbation of the United States, purchased the Seneca's property rights in the area except for certain clearly denominated parts which were reserved to the Seneca. None of the present Tuscarora Reservation was so reserved. As a result of the 1797 transaction, unencumbered fee title in the land on which it is located passed to the Holland Land Company (R. 311-320, 338, 349-351).

In 1798 it was brought to the attention of the Holland Land Company that a group of Tuscarora was squatting on some of the land to which the Company had obtained title. The Company noted that the Tuscarora had been "forgotten at the Treaty of Big Tree" and decided it would be just and a matter of good policy to allow them to continue to live on the square mile known as Parcel A. By this time, however, the original group had been increased by others who had come from Central New York and they had spilled over onto Parcel B*. The Company decided to allow them to have a

* There is no definite proof as to when they came but two events undoubtedly contributed to it. One was the British giving up Fort Niagara in 1796. The other was the sale by the Oneida in 1795 of a large part of the remaining land on which they and the Tuscarora lived in Central New York (N. Y. Assem. Doc. No. 51, 1889, pp. 244-247).

second square mile—the northern half of Parcel B—but upon a petition from the Tuscarora, finally allowed them to have a total of three square miles. This included all of Parcel A and Parcel B. There was no formal conveyance, but there was a definite understanding that the underlying fee and the right of preemption would remain in the Company (Exhs. 232A-232E, E. R. 165-170; R. 319-324).

By deed dated March 30, 1808 the Seneca Indians purported to deed a square mile of land to the Tuscarora "in consideration of love and affection." The property so intended to be conveyed was not described except that it was "in their actual possession now being" (Exh. 232 V, E. R. 201-202). Having sold the land in 1797 the Seneca had no title to convey in 1808 (R. 324-325).

The United States had no part in these transactions. The original two parcels of the Tuscarora Reservation were created for or acquired by the Tuscarora through the unilateral action of the Holland Land Company. Of course, the fact that the Seneca had originally allowed the Tuscarora to sojourn on Parcel A as "squatters" (Exh. 233, *loc. cit.*) may be said to have a part in the overall situation. However, the United States had nothing to do with it whatever.

As stated above none of the land in Parcel A or Parcel B is involved in this proceeding. Only a part of Parcel C is involved; and the history of that parcel now follows.

In 1801 the Tuscarora learned that North Carolina had enacted legislation protecting their rights of occupancy to some land which the tribe had formerly held in North Carolina and upon which a few members were still residing. The Tuscarora asked the President of the United States to assist them in selling the North Carolina land and in buying with the proceeds some other land "in the neighborhood of our present residence" (Exh. 232F, E. R. 171). Henry Dearborn, then Secretary of War, assisted them in the sale of their North Carolina land and in the purchase of

Parcel C from the Holland Land Company. He appointed William R. Davie to help the Tuscarora in their North Carolina negotiations and commissioned him "to give the consent and sanction of the United States, so far as the same may be necessary". Agreement was reached by the Indians for the sale of the North Carolina land for $15,000. Thereupon Dearborn by direct negotiations with the Holland Land Company and by negotiations carried on through Erastus Granger, the War Department's Indian Agent in Western New York, arranged for the purchase of Parcel C from the Company for $13,752.83. Dearborn took a deed to the property from the Company in his own name and in turn granted it a purchase money mortgage. The deed recited that the conveyance was to Dearborn in trust for the Tuscarora. It was not a true trust however because by its terms he engaged to reconvey the property to the Tuscarora or to whomsoever they should designate whenever they so directed (Exhs. 232F-232S, E. R. 171-195; R. 304-307).

The reason the original deed went to Dearborn is clear. The Company was not to be paid the full purchase price at once and a mortgage was to be given to secure payment of the balance. The Company insisted that the conveyance be to a white man who could give a valid mortgage rather than to an Indian tribe which could not. While Dearborn engaged to convey the land to the Indians or their designees whenever they asked him to do so, all he could do while the mortgage was still in force was to convey it subject to a common law mortgage. Thus the Company was protected until full payment was made (Exh. 232O, E. R. 185-186).

It took longer than anticipated to collect for the North Carolina land but full payment was finally made through a series of installments the last of which was received in 1809. Prior to the time that arrangements had been completed for the sale of the North Carolina land and the purchase of the new land the Tuscarora had asked Dearborn to arrange to have the proceeds of the North Carolina sale

deposited in the Bank of the United States and kept there on their behalf until they could purchase the new land. However, as payments were received they were sent direct to Joseph Ellicott, the Holland Land Company's agent in Batavia, New York, and each payment was endorsed upon the mortgage. The money never came into the possession of the United States (R. 304-305; 310-311, 336, 340).

Finally in 1809 when Parcel C was fully paid for, Dearborn executed a deed of it to the Tuscarora Indian Nation. The deed contained a personal warranty on his part to the Tuscarora. In communicating the fact that he had executed the deed, he advised the Nation to petition the New York State legislature to hold the land "in a national capacity" (R. 304-306; Exh. 232T, 232U, E. R. 196-200).

There was no Act of Congress involved in any part of the transactions involving Parcel C except the general statute (1 Stat. 49) which established the Department of War and prescribed that the Secretary of the Department should have such duties as were assigned to him by the President in connection with waging war and dealing with Indians.

Parcels A and B were never taxed by New York or its subdivisions while in the possession of the Tuscarora but Parcel C was continuously taxed from the time the Holland Land Company acquired full title to it until 1821 (Exh. 232W, E. R. 203). In that year the New York Legislature as the result of a petition from the Tuscarora enacted legislation making it tax-free (Chap. 146 Laws 1821, Exh. 232X, E. R. 204). Thus it was as a result of the action of the State of New York that the land was treated as a tax-free Indian reservation.*

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* In 1867 the Supreme Court of the United States in the case of *New York Indians*, 5 Wall. 761, declared that an Indian reservation which had been set apart and protected by a treaty of the United States to be exempt from state taxes. The Court held that to allow a state to tax such land would be a violation of a promise made by the United States to the Indians in the treaty. Of course, no treaty protects any of the Tuscarora land.

As Assistant Attorney General Willis Van Devanter, quoting from *New York Indians* v. *The United States*, 30 Ct. Cls. 413, said in a 1900 opinion (Exh. 250, E. R. 236, O. R. 7424) with respect to the Tuscarora Reservation, the United States "had no property rights in the plaintiff's New York lands and acquired none."

IV

Nature of the Interest in and Ownership of the Land Constituting the Tuscarora Reservation and Present Use of the Land

When the Tuscarora acquired Parcel C they had but recently abandoned a nomadic state and were learning the white man's way of tilling the soil. The Nation soon began to divide specific parts of the land permanently among its members. The members owned the houses and used the land allotted to them for their own purposes to the exclusion of all others. None of the Tuscarora land has ever been subject to allotment by the Federal Government under 25 U. S. C. § 331 *et seq.* (24 Stat. 388 as amended) because no part of the Reservation was established by treaty, Act of Congress or Executive Order. It could not be allotted by the Federal Government for the further reason that the Federal Government did not own the underlying fee (Exh. 250, E. R. 238).*

* Although the Alleghany, Cattaraugus and Tonawanda reservations of the Seneca were established by treaty, Congress recognized its inability to allot Seneca land by specifically exempting it from the Allotment Act. 25 U. S. C. 339, 24 State. 391.

However, in 1854, Chapter 175 of the New York Laws of that year gave legislative validation to the allotment of Tuscarora land by the Nation.*

The process of allotting Tuscarora land has been carried out to such an extent that the only land left in strictly tribal ownership consists of a swamp of 350 acres, a wood lot, the land underneath the only building owned in common by the tribe (the gymnasium) and a national farm consisting of 29 acres (R. 55-56, 69, 198-199, 204). This farm was once allotted to a man who acted as treasurer of the tribe. He surrendered it back to make up for some tribal funds which he had embezzled (Exh. 235, E. R. 207).

Of the 1383 acres of Parcel C needed for the Niagara Project only 45 acres of swamp land—in a corner of the proposed reservoir—is unallotted tribal land (R. 472, O. R. 7395-7396).

Allotted land is treated as the individual property of the allottee just as property owned in fee simple outside the reservation is treated by its owners. The Nation is in the same position, for instance, as the State of New York in that property reverts to it only in the case of escheat for lack of heirs. The allottees buy and sell property and upon death it is transferred by will or intestacy.

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* The statute is now Section 95 of the New York State Indian Law and reads as follows:

§ 95. *Allotment of lands*

"The chiefs or head men of the Tuscarora nation of Indians in the county of Niagara, in council, shall allot and set apart for any Indian or Indian family, making application and not possessing land, so much of the tribal lands as they shall deem reasonable and just; and no tribal lands shall be appropriated by any Indian to his own use, without such consent and allotment. Such chiefs, in council, may appoint a clerk, who shall enter in a book kept for that purpose, every allotment of tribal lands, set apart for any Indian or Indian family, and of the part thereof from which such Indian or family may sell timber and trees, and of the part he is permitted to clear for the purposes of cultivation."

The sole limitation is that it can be sold or descend only to members of the Nation (R. 52-57, 370-376). In addition to buying and selling the property the allottees rent it to other members of the tribe and for some time a considerable amount of it has been rented to non-Indians (R. 53, 69-71, 131-139, 223, Exh. 168, O. R. 7756). As a result a substantial amount of all the area used for agricultural purposes in the Reservation is now farmed by white men under leases from allottees (Exh. 168, O. R. 7756). The allottees receive the full rental payment and the Nation receives nothing. Allottees retain ownership of allotted land even though they have moved permanently from the Reservation (R. 196, 198-199). Allottees have built houses and other buildings on the allotted land and the Nation has absolutely no interest in them and receives no income from them. They are owned and controlled by the allottees just like buildings on non-reservation land (R. 370-376).

From the beginning, control of the property has been pursuant to State law. No Federal statutes have applied to it except the Indian Non-intercourse Acts, the last of which is now 25 U. S. C. § 177 (4 Stat. 730) and 25 U. S. C. § 233 which was enacted in 1950. Disputes over ownerships are settled pursuant to State law in the State Courts*.

The extent of the interest of the allottees compared to the interest of the Nation in Tuscarora land was demonstrated in 1958 when the Niagara Mohawk Power Corporation procured a transmission line right-of-way over a portion of the reservation by agreement with the Nation and the allottees and with the approval of the Niagara County Court and the State Public Service Commission (R. 62-63, 78-80, 85, 87-88, 91). The Company paid $3,000.00 for the Nation's interest and $13,200.00 for the allottees' interest

* Examples of such disputes are to be found in the following cases: *Peters* v. *Tallchief*, 121 App. Div. 309; *Matter of Printup*, 121 App. Div. 322; *Tuscarora Nation* v. *Williams*, 70 Misc. 445; *Mt. Pleasant* v. *Gansworth*, 150 Misc. 584 aff'd 242 App. Div. 675; *Mt. Pleasant* v. *Patterson*, 276 App. Div. 819. See R. 57.

(N. Y. Pub. Serv. Doc. No. 18,879—1958). One allottee, Chief Patterson, alone received $3,300.00 (R. 78).

Similarly, when New York State has taken Indian land by eminent domain the State Court of Claims has awarded far more money to the allottees for their interests than to the Nation for its interest (*Dixon* v. *State*, 4 Misc. 2d 76 (1956); Exh. 230).

There were about 300 Tuscarora on the reservation in 1801 (Exh. 232-F. E. R. 171). There are now 397 (Exh. 210, E. R. 73-110). An additional 168 persons are enrolled as Tuscarora but live off the reservation (*id.*). Two hundred and eighty-eight Indians who are not Tuscarora live on the reservation (R. 198).* Two hundred and twenty-one non-Indians live on the reservation exclusive of those who live in trailers (R. 177, 189, 191). There are 180 trailers on the reservation (R. 160-162), only one of which is inhabited by an Indian (R. 191). While originally the residents of the reservation maintained themselves by farming (R. 324, 337-338; Exhs. 232-D, 232-E, 232-P, 233, 235 E. R. 168, 170, 187, 205) the bulk of them who work now do so off the reservation in factories or on construction work (Exh. 210, E. R. 73-110). Only a small percentage of the reservation is now used for farming (R. 477-479; Exhs. 207, 227, E. R. 57, O. R. 8277). Only 17% of the land was tilled last year (*id.*). The percentage of reservation land used for farming has decreased much more **rapidly than the percentage of total land used for farming in Niagara County and New York State. While farm produce has increased in New York State despite the use of less land, farm production on the reservation has decreased** steadily and heavily (Exh. 207, E. R. 47).

There is only one full-time farm operation on the land needed for the power project (R. 80). Chief Patterson and one of his six sons farm 630 acres of which they own 170

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* There is no evidence in the record with respect to the amount of Indian-blood any of the persons acknowledged to be Tuscarora or non-Tuscarora Indians possess.

and rent 460 from others. Of the 630 acres 577 are within the 1383 acres needed for the reservoir (R. 75-77).

On the part of the reservation not needed for the power project seven white farmers operate 640 acres under leases from individual Indians (Exhs. 168, 227, O. R. 7756, 8277; R. 131-139, 223-224). One white farmer operates the national farm on lease from the Nation (R. 131-133).

There are 180 houses on the reservation, of which 37 are in the part needed for the reservoir (R. 159, 72). Of the 37, about half are shacks and about half are fairly adequate dwellings. (R. 159; Exh. 203, O. R. 4546.)

It would be difficult to determine what property rights the Nation as such continues to have in Parcels A and B where the underlying fee is owned by the assignees of the Holland Land Company and the Tuscarora have only right of occupancy. However, with respect to Parcel C the property interests are clear. The Nation is still the holder of the record title. Nevertheless, the individual allottees own complete property rights which are indefeasible except that they are not transferable to non-members of the Nation. What common land is left within the Tuscarora Reservation is treated similarly to the common or tribal land in the Federally created reservations whereas the allotted land within the Tuscarora Reservation is in most essential respects similar to the allotted non-tribal land in Federal reservations, which is specifically subject to condemnation under 25 U. S. C. § 357 (31 Stat. 1084).

V

Supervision of the Tuscarora Reservation

The Congress undoubtedly has legislative power under the Commerce Clause to provide for the exercise of Federal supervision over the Tuscarora Reservation. It has not done so and the Federal government has never exercised such supervision.* Chapter 1 of Title 25 established the Bureau of Indian Affairs with general authority to deal with Indians but no statute of the United States gives it supervisory power over the Tuscarora Reservation.**

The only dealings the Federal Government has with the members of the Tuscarora Nation involve the annual distribution of cloth under Article 6 of the 1794 Treaty of Canandaigua. This cloth is distributed by the Department of Interior to Indians who are descended from members of the Six Nations regardless of whether they live on reservations are not (R. 195-197).

The United States, however, has not only failed to enact any legislation giving the Department of Interior or any other Department of the United States Government super-

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* The one possible exception involves the 7 Major Crimes Act (23 Stat. 385) which the New York Court of Appeals held in *People ex rel Cusick* v. *Daly*, 212 N. Y. 183 (1914) to give exclusive jurisdiction to the Federal Courts over seven major crimes when committed by Indians on the reservation. This holding was overruled in 1948 by the passage of Section 232 of Title 25. (62 Stat. 1224).

** In connection with Federal reservations where the United States owns the underlying fee there are government officials with the title of Superintendent who actually superintend such reservations. (25 U. S. C. §§ 25, 33; 38 Stat. 598, 80; see also Act of July 27, 1868, 15 Stat. 228; Act of June 4, 1924, 43 Stat. 376, with reference to the lands of the Eastern Cherokee, cited in *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417, 421-422 (4th Cir. 1938)); Act of June 7, 1924, 43 Stat. 636, with reference to Pueblo Indian lands.

intendence over the Tuscarora Reservation, but has failed to give authority to any department to approve any actions of the Nation with respect to its lands (Exh. 250-253, E. R. 234-241).

Under §§ 13, 271-309a, 452-454, and 562 of Title 25 the United States Government has provided schools, health services and other social services to Indian Reservations in the West but has never throughout its history provided any such for the Tuscarora Reservation. (R. 174, 166, 172).

Conversely, the State of New York has always provided education, health and public welfare benefits to the Tuscarora without Federal participation.

The extent to which the State has interested itself in its Indian Reservations is evidenced by the fact that from 1931 through 1947 it expended $4,621,177 on education for which neither the Indians nor the Federal Government contributed anything, and $2,497,271 for public welfare relief and other benefits for which neither the Indians nor the Federal Government contributed anything (Rep. J. Leg. Com. on Indian Affairs, N. Y., 1948 p. 14).

In the case of schooling the State pays the whole cost of schools and teachers on the Tuscarora Reservation, and pays for the attendance of Indian students at nearby high-schools (R. 174).

The State provides the services of a physician and nurse on the reservation completely at its own expense (R. 164-169).

In the case of public welfare the Indians get the same benefits as others except that the cost is borne completely by the State instead of being shared by the State and the local community (R. 169-172, 232-235).

Throughout the history of Indian reservations in New York State, with the exceptions noted herein, whatever supervision was exercised has been by the State of New York and no Department of the Federal Government has ever

held tl . it was the Department under which the supervision of the Tuscarora Reservation fell.

The Department of Interior has not even had an Indian agent* in New York since 1949 and prior to that time his main function was superintending the leasing of land in the Alleghany and Cattaraugus reservations.** The only other duties he is known to have performed were in connection with the annual allotment of cloth under the 1794 treaty of Canandaigua and payments to some Indians—not including the Tuscarora—under other treaties (R. 361, 368-369).

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* In 1954 Congress by Joint Resolution 108 (83rd Cong. 1st Sess.) declared that Federal supervision over Indians in New York and several other states should be terminated at the earliest possible time and that thereupon the Indian agents in those states should be withdrawn. The Resolution requested the Secretary of Interior to recommend legislation to accomplish these purposes. The Department drafted proposed legislation dealing with New York State and submitted it to Congress. In doing so it pointed out that its Indian agent had already been withdrawn from New York in 1949. The Department pointed out that the New York Indians would oppose the proposed legislation and that they were definitely against capitalization of the annuities paid them annually under treaties. The Department strongly implied that the legislation was not necessary. The Congress took no action with respect to it. (Exh. 255, E. R. 243, R. 358-370)

** The Congress, at the request of New York State, enacted statutes in 1875 and 1890 validating existing leases in the Alleghany and Cattaraugus Reservations of the Seneca and authorizing future leases there (18 Stat. 330; 26 Stat. 558). See note, p. 63, *infra*.

VI

Legislative History of the 1957 Niagara Redevelopment Act

As a result of the Schoellkopf disaster in June 1956, the Power Authority developed plans to utilize all the water of the Niagara River available to the United States by enlarging the scope of the project as previously planned and increasing the size of the project features. In January, 1957 it published a brochure (Exh. 191, E. R. 35-44) which described the new project and contained maps showing an enlarged reservoir located in part on Tuscarora land. Although ownership of the various parcels needed for the project was not stated, roads were indicated and thus the maps showed unequivocally that the reservoir took in what is Tuscarora land. (Exh. 191, E. R. 42-43, Exh. 192, E. R. 45, R. 387-388).

The fact that Tuscarora land was included in the plans was an open and notorious one. Maps and other material from the brochure were printed in the Niagara Falls newspaper. Copies were sent to the Tuscarora together with advice that some of their land was needed. With the aid of the brochure the Authority attempted in January, February and March, 1957 to negotiate with the Tuscarora for the taking of their land (R. 111-113; Exh. 191, 192, 193, E. R. 41-46).

In April, 1957 the Senate Public Works Committee held hearings leading to the passage of the Niagara Redevelopment Act which mandated the Federal Power Commission to issue a license to the Power Authority. The Authority's brochure (Exh. 191) was introduced into evidence at the hearing and was examined by each member of the Public Works Committee (R. 263-264, 384-385).

The testimony and this exhibit showed: (a) that the project then being discussed and now known as Project

2216 would have an installed capacity of 2,190,000 kw, (Item IV, p. 71)* a dependable capacity of 1,800,000 kw, (*id.* pp. 71, 76, 82) a total energy output of 13,000,000 kwh, (*id.* p. 15) and a dependable energy output of 10,700,000 kwh (Exh. 191, E. R. 40); (b) that the industries in the area were suffering badly from the fact they no longer had for their use the cheap power formerly produced by the Schoellkopf plant which had brought the electrometallurgical and electrochemical industries to Niagara (Item IV, pp. 15, 33-34, 70, 156, 179-180, 221-224, 229-231, 234, 356-357); (c) that in order to stay in the area industry needed to be able to buy power for a maximum of 4.5 mills (*id.* pp. 72, 225, 356); (d) that the project as planned by the Power Authority would produce power for about 4 mills (*id.* pp. 26, 75, 187, 349, 355-356); (e) that in order to do this a reservoir was necessary (*id.* pp. 71, 172; Item II, pp. 6, 7; Item III, p. 5); (f) that the reservoir would be built in open country (Exh. 191, p. 43); and (g) that the reservoir was on the outskirts of the City of Niagara Falls (Exh. 191, 42-43, 45). As above stated, Exhibit 191 showed the actual location of the reservoir including Tuscarora land, although it was not labeled as such on the exhibit. The only "open country" upon which the reservoir could possibly be built includes Tuscarora land (R. 267-268). The Committee was told that the project would be built according to sound engineering principles and was advised that these should be passed on by the Federal Power Commission (Item III, p. 69).

On June 27, 1957, the Senate Public Works Committee reported out the bill which became Public Law 85-159 (Niagara Redevelopment Act).

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* The following public document items were offered in evidence at the hearings before the Commission and transmitted as part of the record:

Item I. Sen. Doc. 113, 84th Cong., 2d Sess. (O. R. 4946).

Item II. H. Rep. 862, 85th Cong., 1st Sess. (O. R. 5010).

Item III. S. Rep. 539, 85th Cong., 1st Sess. (O. R. 5021).

Item IV. Hearings before Subcommittee of the Senate Committee on Public Works on S. 512 and S. 1037, 85th Cong., 1st Sess. (O. R. 5034).

The House Public Works Committee did not hold public hearings on any Niagara bills in 1957 but on July 23, 1957 it reported out a bill identical to the one drafted by and reported out by the Senate Committee* (H. Rep. No. 862, 85th Cong. 1st Sess., pp. 3-4). Prior thereto the House Committee was furnished with copies of Exhibit 191 (Exh. 223).

The House Committee Report stated (p. 3) that further hearings in 1957 were unnecessary because extensive hearings on Niagara legislation had been held in previous sessions of the Congress. The report specifically referred to hearings held by the House Committee on Public Works in the 2nd Sess. of 81st Cong., 1st Sess. of 82, 83 and 84 Cong. It also referred to joint hearings held by the Senate and House Committees in the 1st Sess. of the 83rd Cong. and by the Senate Committee in the 1st Sess. of the 82nd and 83rd Cong. and the 2nd Sess. of the 83rd Cong., both sessions of the 84th and the hearing held by it in the 85th. Thus the 1957 report was based on all testimony previously adduced.

No witnesses appeared on behalf of any Indian tribe at the hearings on Niagara legislation in 1957, although the Tuscarora had been informed that part of their land would be needed for the project. (Exhs. 191, 192, 193, E. R. 35-46.) However, New York Indians were represented at two hearings on Niagara legislation in 1951. (Hearings before House Committee on Public Works, September 19-21, 1951, Public Document No. 82-8, pp. 163-169; Hearings before Senate Committee on Public Works, August 21-22, 1951 on S. 517, S. 1963 and S. 2021, pp. 182-188).

At those hearings a witness on behalf of the Seneca claimed they are the owners of a strip of land a mile wide along the Niagara River from Lake Erie to Lake Ontario

* As stated above, the 1957 report of the House Public Works Committee (Item II) in connection with the bill which became Public Law 85-159 referred to these hearings as well as to hearings held in subsequent years.

within which the main power plant, surge basin, intake structures and part of the waterway must necessarily be located. (See centerfold map. Rights to this strip and to the islands in the river claimed by Massachusetts were ceded to New York in the Hartford Compromise of 1786. See pp. 20-21, *supra.*) The witness also claimed the Seneca owned all the water rights and all the islands on the United States side of the river; that under the Treaties of 1784, 1789 and 1794 the "Mile Strip" with riparian rights, and the islands were guaranteed to the Seneca; and that agreements for the purchase of part of the strip by the State of New York in 1802 and of the islands in 1815 were in violation of the Indians Non-Intercourse Acts (precursors of 25 U. S. C. § 177).

It was and still is the Seneca's claim that no United States Commissioner was present in 1802 and 1815 when New York State bought out Seneca rights in the southern half of the mile strip and the islands respectively. There appears to be no dispute about the fact that this is true as far as the 1815 transaction was concerned (N. Y. Assem. Doc. No. 51, 1889, pp. 211-213)*.

Part of the intake works for the project and a section of the water conduits are being built in the part of the mile strip covered by the 1802 agreement. Part of the intake is being built on Connors Island which was covered by the 1815 agreement. The main power house and other project works are being built in the northern section of the mile strip, which is also claimed by the Seneca.**

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* In amended petitions to the Indian Claims Commission the Seneca allege that no Commissioner was present at the treaty between the State of New York and the Seneca held on August 20, 1802 (Indian Claims Commission, Docket No. 342-B, Para. 22 Docket No. 342-C, Para. 22).

** New York never bought out any Indian rights with respect to the Northern half of the mile strip on the theory that these rights had been given up by various treaties, beginning with the Treaty of April, 1764.

When the Seneca's representative testified in 1951, both the Senate and House Committees had pending before them bills providing for development of the Niagara River by the Power Authority (S. 1963, H. R. 5099), by the Federal government (S. 517, H. R. 1642), and by private companies (S. 2021, H. R. 3146). Neither Committee issued a report during that term of Congress, but at the hearings individual members of each Committee made it plain that ownership of the land by the Indians would not deter Congress from passing legislation for the project. Some members advised the Indians that the Courts would protect their rights and others suggested that they seek relief for wrongs done them in the past from other committees of Congress (Senate Hearings, *supra*, pp. 187-188; House Hearings, *supra*, pp. 166, 167, 168).

One member of the House Committee said:

> "Mr. ANGELL. I gather from what you are saying that you are interested in protecting the rights of the Indians. I did not hear your testimony.
>
> "I come from Portland, Oreg. We have a large number of reservations, Indian lands, and rights under treaties, particularly on the Columbia River. The way it is handled out there, the Government takes any of their property, which it can do, of course under condemnation. It can condemn the property owned by me or the Indians as far as that goes, but it must compensate the person who owns the property. The Indians have recourse against the Government for its value if their property is taken."

The House Public Works Committee held hearings in June 1956 three weeks after the destruction of the Niagara Mohawk Schoellkopf plant which, under plans prepared up to the time of the hearing, was to continue to utilize about 20,000 cubic feet per second of water available to the United States under the 1950 treaty (R. 282).

The testimony at the hearings indicated that the plan would have to be revised to increase the scope of the project in order to utilize all of the water of the Niagara available to the United States, including about 20,000* cubic feet per second for which Niagara Mohawk had a Federal Power Commission license running to 1971, and had theretofore used at its Schoellkopf plant (R. 280, Item VI, pp. 15, 18).

Testimony was given by a representative of the Corps of Engineers with respect to a plan of development indicated on a map showing a storage reservoir of 30,000 acre feet containing about 1,200 acres, and by a representative of the Power Authority by reference to a model showing a reservoir which was to have a capacity of about 40,000 acre feet and to cover about 1,700 acres.** (The Federal Power Commission's Bureau of Power had prepared a report which showed a reservoir of 22,000 acre feet occupying an area of 850 acres.) (R. 251-257).

A brochure (Exh. 218, E. R. 131-151) addressed to the Members of the House of Representatives on July 25, 1957 after the bill which became Public Law 85-159 had been reported out by the Public Works Committees of both Houses but before it was passed in either, was sent to all members of the House and Senate. The files of the House Public Works Committee still contain a copy of it (R. 386-387). The document was concerned chiefly with power marketing, but a table inside its front cover showed that the project reservoir would have a capacity of 60,000 acre feet.

The reports of both committees recommending passage of Public Law 85-159 referred to the fact that the project

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* Niagara Mohawk had a temporary revocable license for some additional water, some of which it used at Schoellkopf and most of which it used at its low head Adams plant.

** This witness testified that the Authority could condemn all land needed for the project regardless of who owned it (R. 257-261).

would contain a storage reservoir* and indicated the concern of Congress that the project be built as quickly as possible so that cheap power would be available to relieve the emergency caused by the Schoellkopf disaster (Items II, p. 2 and III, pp. 3, 8, 9, 10).

Both reports showed that the project as planned by the Power Authority would have an installed capacity of 2,190,000 kilowatts of which 1,800,000 would constitute firm power on a 17-hour-a-day basis. They specifically stated that "pump-storage and pumping-generating facilities will be required" in order to achieve sufficient firm capacity.

A definite representation was made in the Senate by Senator Javits that the project would have a firm capacity of 1,800,000 kilowatts on a 17-hour firm basis. (Cong. Rec. Vol. 104, Part 130, p. 14,444, 85th Cong. 1st Sess.)

The Federal Power Commission Examiner said, at the conclusion of the hearing on remand (R. 387-388):

> "In the report of the Senate Public Works Committee on S. 2406 (Senate Report No. 539, dated June 27, 1957, first session of the 85th Congress, page 6, it was said:
>
> '. . . there is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by [among others] the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station.'

* The House report mentioned a reservoir of 22,000 acre feet covering 850 acres of land but specifically stated that it was a part of an old plan prepared before the Schoellkopf disaster. It stated that the project would have to be enlarged. The extent to which the reservoir had to be enlarged was of course brought to the attention of the Congress through Exh. 191 (R. 383-385, 387-388 F. R. 35) and Exh. 218 (F. R. 131). The House Report and Exh. 218 taken together showed clearly that since the new reservoir was about three times as big as the old it would require at least 2500 acres of land.

"These 'more recent' studies are reflected by exhibits introduced in this hearing which show that the reservoir proposed by these plans envisioned the taking of Tuscarora Indian lands even though not specifically so stated".

VII

Necessity of Tuscarora Land for Niagara Project

In passing The Niagara Redevelopment Act Congress mandated that a Niagara Project be built capable of utilizing all the water of the Niagara River available by international agreement and that power be produced as cheaply as practicable. As shown *supra* (pp. 33-40), it understood in passing the legislation that the project would have a dependable firm capacity of 1,800,000 kilowatts on a 17-hour basis, and it specifically understood that in order to have that much capacity a 60,000 acre foot reservoir was necessary.

That Act required the Commission to include in the Niagara license conditions required and deemed necessary under the Federal Power Act. The first condition listed in the Act is contained in § 10 (a) and requires that the project be built in such a way as to be best adapted to a comprehensive plan for development of the river.

The Commission on February 2, 1959 found that "a pump storage reservoir with usable storage capacity of 60,000 acre feet is required to utilize all of the United States' share of the water of the Niagara River made available by international agreement, a requirement expressly imposed by Congress in the Act of August 21, 1957, Public Law 85-159," and that a smaller reservoir would "result in a plan not best adapted to the comprehensive development of the Niagara River for power and other purposes" (R. 487-489).

In effect, the Commission has found that the condition prescribed in § 10 (a) of the Federal Power Act cannot be complied with unless the reservoir has a capacity of 60,000 acre feet.

The evidence shows that a 60,000 acre foot reservoir together with the roads and transmission lines which must necessarily be built around it requires approximately 3,000 acres of land (Exh. 189, E. R. 31).

Because of topography, community disruption, and engineering factors it would not be practical or feasible to build such a reservoir without using Tuscarora land. The uncontradicted evidence in the record shows this.

The general location of the reservoir is limited by geography because it must be on land of approximately 620 feet in elevation and must be near the Niagara escarpment but not actually on it (R. 33, 109). It is limited by the engineering necessity for a sufficient surge basin between the main power plant and the pumping-generating plant (R. 35). It is limited by the present location of the main line tracks of the New York Central Railroad which it would be utterly impractical to move (R. 26, 239-240).

If alternative land were attempted to be used, delay in construction of the project and in production of badly needed power would amount to two or three years (R. 150, 241, 487). Serious community disruption including, among many things the moving of approximately 450 homes as against some 37 on the Tuscarora land would result (R. 49-51, 72, 75, 101-103, 108-110, 123-124, 130-131, 140-148, 150-151, 208-222, 238-239, 487; Exh. 189, E. R. 31). Building the reservoir on the only alternative site possible from an engineering standpoint would increase construction costs about $20,000,000, thus increasing the cost of power since construction cost is the controlling factor in determining the cost at which power is to be sold (R. 37, 39-40, Exh. 66, O. R. 4304). Because of topography it would be necessary to take 1,721 acres to replace 1,383 acres of Tuscarora land (R. 105).

The use of alternate land is not feasible and if Tuscarora land is not available for the Niagara project the capacity of the reservoir will have to be reduced (R. 283-285). With a reduced reservoir the project would not comply with the mandate and understanding of Congress. With a reduced reservoir the project could not utilize all of the United States share of the water, because there are periods when the flow of the river is so high that the turbines and generators would not be capable of utilizing all of it and part of the water would go waste. The firm capacity of the project would be reduced below the 1,800,000 kilowatt capacity contemplated by Congress. This would result in an increase in the price at which power could be sold and be contrary to the Congressional mandate in the 1957 Act that power shall be sold to preference customers "at the lowest rates reasonably possible" and that low power costs shall be restored to industries formerly served by the Schoellkopf plant "as nearly as possible." (R. 225-229, Exh. 13 E. R. 1)*

The Commission found that an attempt to use alternate land in place of Tuscarora land in order to avoid reducing the size of the reservoir would delay construction, cause severe community disruption, divide the town of Lewiston in two, require rerouting "at unreasonable expense" of main highways and railroad tracks, disrupt schools, sewage, water supply, fire protection, civilian defense and require the removal of approximately 450 homes and two cemeteries and the destruction of a new school costing more than one million dollars (R. 487).

The inescapable conclusion is that Tuscarora land is absolutely essential to a comprehensive development using all of the available water of the Niagara River as mandated by Congress.

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* The importance of cost was discussed several times in Committee reports and in the debates. See e.g., Item II, pp. 3, 8, 9, 10; Item III, pp. 2, 7; 104 Cong. Rec. 13195, 14438, 14445. "The cost of public projects is a relevant element in all of them." *United States ex rel. Tennessee Valley Authority* v. *Welsh*, 327 U. S. 546, 554 (1946).

SUMMARY OF ARGUMENT

The judgment appealed from approved the license issued to petitioner for the Niagara Power Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes" and directed the Federal Power Commission to amend its licensing order "so as to exclude specifically the power" of petitioner to condemn respondent's land on the ground stated therein that the Commission had failed to make a finding pursuant to § 4(e) of the Federal Power Act that the license would not interfere or be inconsistent with the purpose for which the Tuscarora reservation was created or acquired.

Such a finding is required only when the Commission's authority to issue a license is derived from § 4(e) of the Federal Power Act and when the license covers land which constitutes a reservation as defined in §§ 4(e) and 3(2). By definition such a reservation must be (i) part of the public lands and reservations of the United States, (ii) part of lands or interests in lands owned by the United States and not eligible for private appropriation under Federal law, (iii) part of a reservation which "falls" under the "supervision" of some Department of the United States Government and (iv) "tribal lands embraced within an Indian reservation". Respondent's land does not constitute such a reservation because it does not meet any one of those four requirements, and the doctrine of federal guardianship of Indians does not make it such a reservation. In addition, § 10(e) of the Federal Power Act, which provides compensation to the United States when such a reservation is made subject to a license and § 24 which authorizes the Commission by administrative action to put a licensee in possession of such a reservation, show that lands in which the United States has no property interest but which are owned in fee by others cannot possibly constitute a reservation within the meaning of § 4(e).

Even if respondent's land were a reservation within the meaning of § 4(e), the holding of the court below was wrong because it frustrates the direction of Congress that the project be capable of using all water available to the United States. Petitioner's license was not issued under the authority conferred by § 4(e) but was issued pursuant to the express directive contained in the 1957 Niagara Redevelopment Act. The requirement of § 4(e) that the Commission make a finding in the case of reservations of the United States is merely a limitation of the Commission's power to issue licenses with respect to such reservations when its power to so do comes from § 4(e). Since that power was not used, the limitation upon it was of no significance.

The only purpose of § 4(e) is to authorize the Commission to issue licenses for water power development (i) on streams over which Congress has jurisdiction to regulate commerce, (ii) upon the "public lands and reservations of the United States" and (iii) in connection with surplus water from government dams. By the 1957 Niagara Redevelopment Act Congress superseded § 4(e) with respect to the Commission's power to issue a license for the Niagara and specifically directed the Commission to issue a license to petitioner for a project capable of utilizing all the Niagara water available to the United States. In passing the 1957 legislation Congress put no limitation on the Commission's power to issue a Niagara license. It did, however, direct the Commission to include among the licensing conditions those deemed necessary and required under the terms of the Federal Power Act and those prescribed in the 1957 Act itself. The 1957 Act imposed no limitation or condition with respect to the taking of property for the project and on the contrary clearly authorized the Commission to include in the project any land necessary to use all the Niagara water, including respondent's land. The legislative history of the 1957 Act makes this clear. The requirement in § 4(e) of the Federal Power Act that the Commission make findings when it licenses reservations of the

United States being a mere limitation on the Commission's power to issue licenses on such reservations under the authority of that section is not one of the conditions "required under the terms of the Federal Power Act" which the 1957 Act requires to be placed in a license.

3. Tuscarora land is necessary for the Niagara Project because without it (i) the mandate of the 1957 Act that the project be capable of utilizing all the Niagara water available to the United States cannot be obeyed; and (ii) compliance cannot be made with the requirement of § 10(a) of the Federal Power Act that the license issue upon the condition that the project will be best adapted to a comprehensive plan for improving or developing the Niagara River. Therefore, the holding of the Second Circuit Court of Appeals that the 1957 Act constituted Congressional consent to the taking of respondent's land and that petitioner had a right to take that land under § 21 of the Federal Power Act which authorizes a licensee to condemn any land necessary for a project is correct and the holding of the court below is wrong.

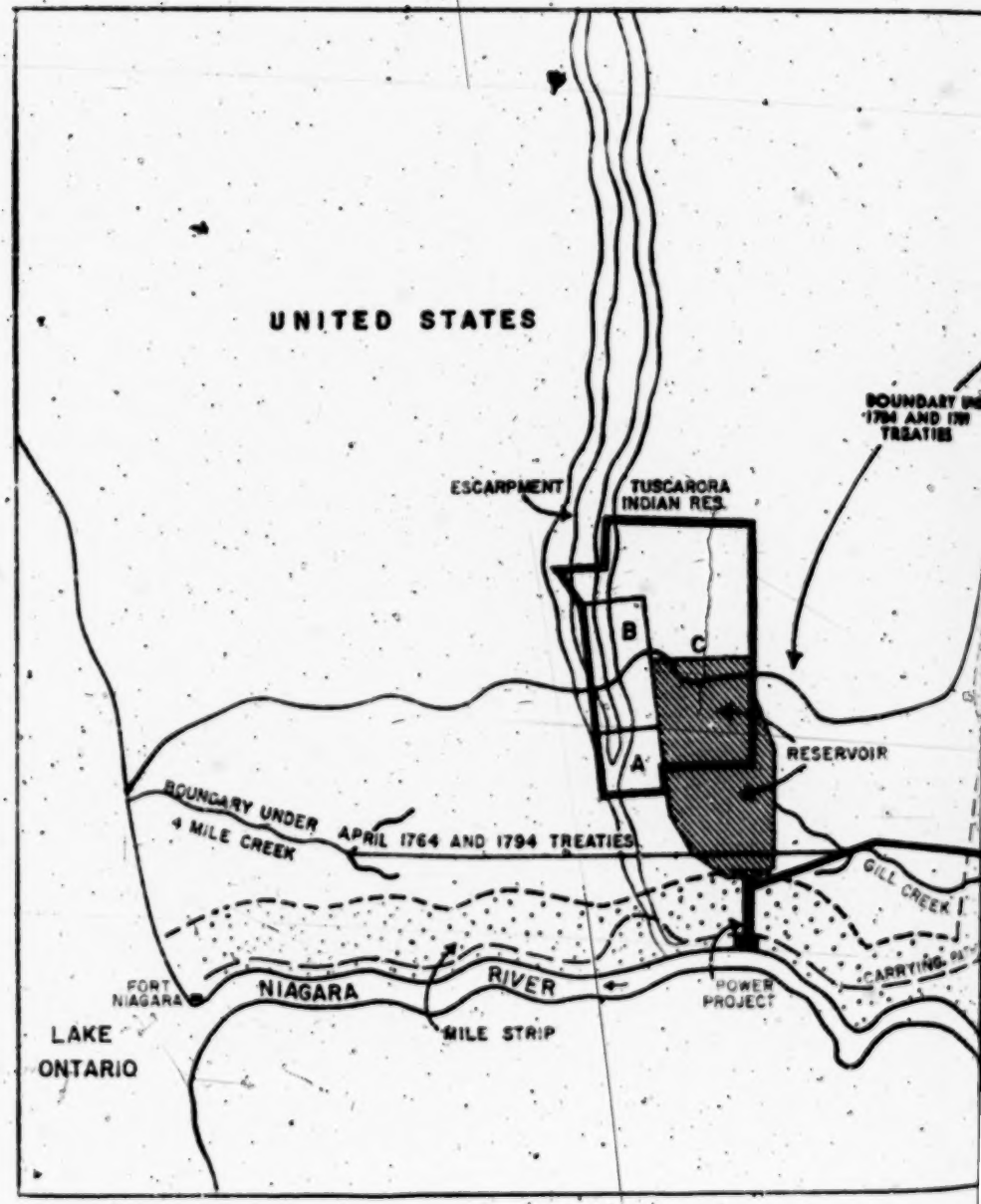
The Federal Power Commission had authority to include within the land covered by the Niagara license any land which the licensee has a legal right to acquire by any principle of law. Petitioner had a right to acquire respondent's land because of the Congressional consent granted in the 1957 Act and the Federal Power Act. In addition, the State of New York on petitioner's behalf had a right to acquire that land for a public purpose in the same way as it has been acquiring Indian land within its borders since the Revolution because no Federal treaty or statute bars its doing so and Congress has therefore tacitly consented.

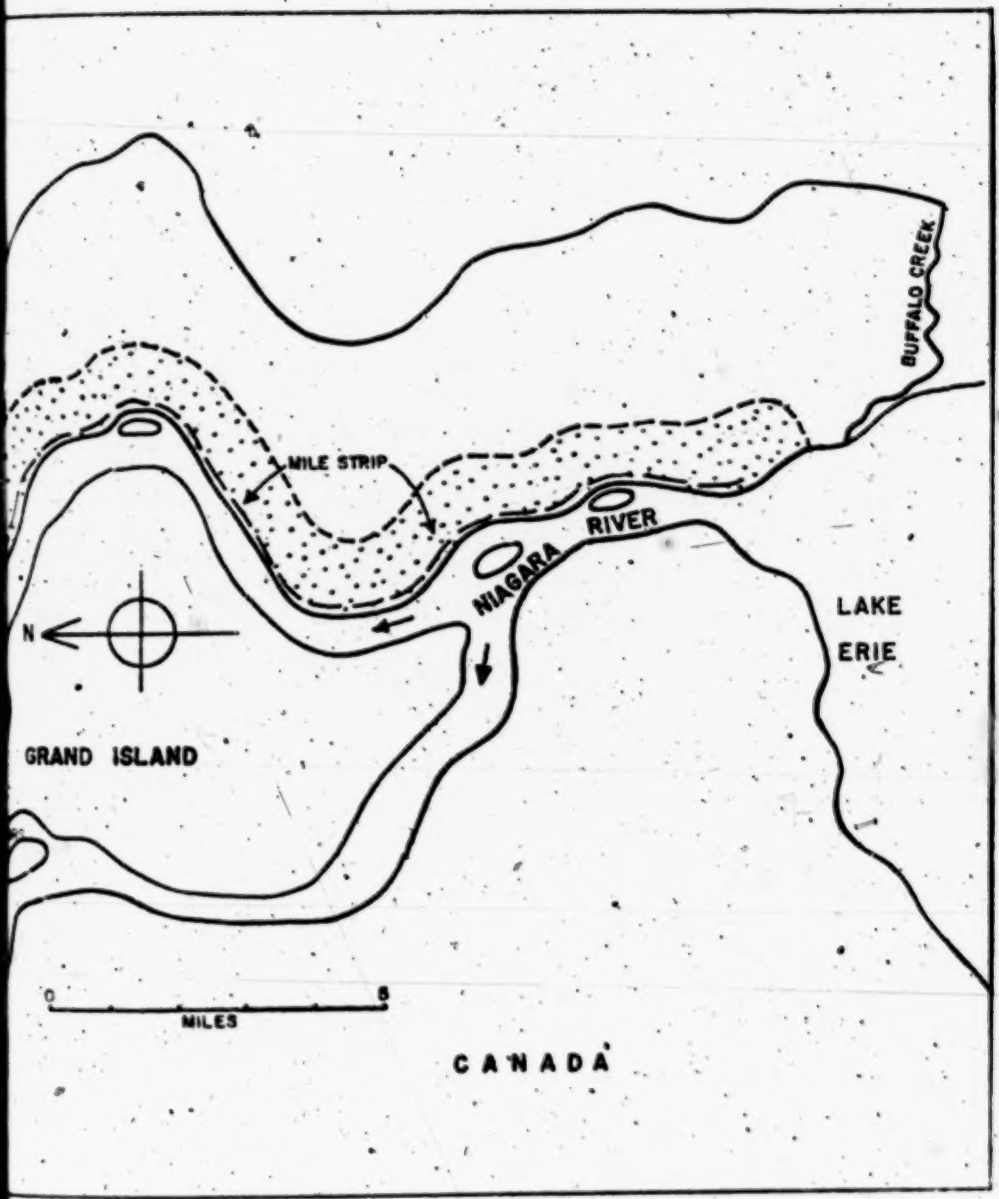
4. Respondent by choice brought two separate and parallel proceedings testing petitioner's right to acquire its land. It brought an action for an injunction and declaratory judgment in a District Court of the Second Circuit at a time when it could have brought a review proceeding in either the Second Circuit or the District of Columbia Cir-

cuit. It later brought a review proceeding in the District of Columbia Circuit. However it continued to prosecute the prior action. The result was that judgment was actually entered against it in the District Court before the District of Columbia Court obtained jurisdiction of the review proceeding under § 313(b) of the Federal Power Act through the filing by the Federal Power Commission of the transcript of the record. If the Second Circuit Court of Appeals —to which respondent appealed—instead of entering a judgment declaring petitioner had a right to take respondent's land had entered a judgment in favor of respondent, both petitioner and the Federal Power Commission would have been bound. But in any case, respondent should not be allowed to re-litigate the same issues on the basis of the same arguments in a second court of the United States.

An actual controversy having existed with respect to petitioner's right to acquire respondent's land, the courts of the Second Circuit had jurisdiction under Sections 1331 and 2201 of Title 28 of the United States Code to determine every issue involved. Even though the court below acquired exclusive jurisdiction upon the filing of the transcript of the record by the Commission "to affirm, modify or set aside" the Commission's licensing order it was bound by the judgment in the Second Circuit action to the extent of every litigable issue which was common to that action and the review proceeding.

5. The judgment appealed from was wrong on the merits; it was wrong because it was contrary to a prior binding judgment on the same issues; it was wrong because the order of the Commission which was the subject of the Court's review did not aggrieve the party which brought the proceeding; and it was wrong because it constituted a usurpation of congressional power and administrative functions.


UNITED STATES
ESCARPMENT
TUSCARORA INDIAN RES.
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A
RESERVOIR
BOUNDARY UNDER APRIL 1764 AND 1794 TREATIES
4 MILE CREEK
GILL CREEK
FORT NIAGARA
NIAGARA RIVER
POWER PROJECT
MILE STRIP
LAKE ONTARIO


BUFFALO CREEK
MILE STRIP
NIAGARA RIVER
LAKE ERIE
N
GRAND ISLAND
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5
MILES
CANADA

POINT I

The Court below erred in holding that a finding under § 4(e) of the Federal Power Act was required, because land of respondent needed for the project is not part of a reservation within the meaning of that section.

By its terms the order and judgment appealed from approves the license issued to petitioner "except insofar as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes" and directs the Federal Power Commission "to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." This peremptory direction to the Commission was based on the ground—as stated in the judgment—that the Commission had failed to make the finding which is required by the limitation on its power to issue licenses under § 4(e) of the Federal Power Act upon any part of the public lands and reservations of the United States, *i.e.* that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired.

As we show in Point II *infra*, the finding was not necessary because petitioner's license was issued pursuant to the direction of Congress in the 1957 Niagara Redevelopment Act and not under the authority granted the Commission by § 4(e) of the Act. However, since the judgment appealed from is by its terms based on the premise that respondent's land needed for the project is part of a "reservation" within the meaning of § 4(e) we shall first demonstrate that the premise is false and thus that the judgment must be reversed for that reason.

By § 4(e) Congress in the exercise of its power under the Commerce Clause (Art. I, Sec. 8) authorized the Commission to issue licenses for power development on water over which it has jurisdiction to regulate commerce

and in the exercise of its power under the Property Clause (Art. IV, Sec. 3) authorized the Commission to issue licenses for water power development upon the "public lands and reservations of the United States" and in connection with surplus water from government dams. *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 443-444 (1955).

With respect to its grant of authority to issue licenses upon "reservations of the United States" Congress imposed the following limitation:

> "That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

"Public lands and reservations of the United States" are further defined in § 3(1) and (2) of the Act, to wit:

> "(1) 'public lands' means such lands and interest in lands ***owned by the United States as are subject to private appropriation*** and disposal under public land laws. It shall not include "reservations", as hereinafter defined;
>
> (2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands ***owned by the United States, and withdrawn, reserved, or withheld from private appropriation*** and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks."

Webster's International Dictionary defines "reservation" as

> "*a tract of the public land reserved* for some special use, as for schools, for forests, for the use of Indians,

etc. U. S." (2nd Ed. p. 2118; see also Black's Law Dictionary, 3d Ed. p. 1592; American College Dictionary, 1st Ed. p. 1031; *cf.* opinion below R. 429-430).

A

The Tuscarora land needed for the project is not part of the public lands and reservations of the United States.

The word "rese vation" as used in the proviso of § 4(e) immediately following the authorization to issue licenses on "public lands and reservations of the United States" obviously has the same meaning in the proviso as it has a few lines above. This means, of course, that a reservation to which the proviso applies must be "a part of the public lands and reservations *of the United States.*"

There is no question but that the "public lands and reservations of the United States" referred to in § 4(e) are public lands and reservations belonging to the United States. This would be true even if the term were not clearly defined in that fashion in §§ 3(1) and 3(2) and even if the term did not have that meaning throughout Federal statutes, including other sections of the Federal Power Act and several sections of the Public Lands Law (e.g. 43 U. S. C. §§ 148, 191, 203, 961).

In enacting § 4(e) Congress exercised its power under the commerce clause to deal with interstate commerce and foreign commerce and its power under the property clause to deal with the property of the United States. Had it chosen, it could also have exercised its power under the commerce clause in connection with commerce with Indians. However, it did not do so.

The suggestion of the court below in its memorandum opinion that Congress intended even in cases where licenses are issued under its power over interstate and foreign commerce that a § 4(e) finding be required in connection with Indian land not owned by the United States is not compatible with the plain language of § 4(e) and other sections of the Federal Power Act.

Section 23(b) bears this out. That section also uses the term "public lands and reservations of the United States." It does so in a manner which makes it clear that the terms refer only to property owned by the United States. It requires a person, state or municipality to obtain a Federal Power Commission license under § 4(e) as a condition precedent to building a power project in connection with water over which Congress has jurisdiction because of its power to regulate commerce among the states and with foreign nations and similarly requires such a license if public lands and reservations of the United States are affected. Section 23(b) affirmatively states that if the Commission finds that interstate or foreign commerce is not affected, and if no public lands or reservations are affected, the project may be built upon compliance with state laws.* The section contains no requirement for a license on the basis that the project will affect commerce with Indians.**

The term public lands and reservations of the United States, of course, has the same meaning in § 23(b) as it has in § 4(e). In both cases its definition depends upon §§ 3(1) and 3(2). Section 23(b) makes it clear that it is intended to deal only with waters involved in interstate and foreign commerce and property owned by the United States.

There are several million acres of public lands in New York State which are owned by the State of New York and constitute the forest preserve. They are reserved from private appropriation and use by the State Constitution. Certainly no one would argue that they constitute public

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* The Commission found that the project would affect the navigable waters of the United States (R. 400) but not the public lands and reservations of the United States, since respondent's land does not constitute such a reservation (R. 413).

** Sections 3(8) and 4(g) also make it plain that in enacting Part I of the Federal Power Act Congress intended to exercise its power under the commerce clause only to the extent that interstate and foreign commerce, as distinguished from commerce with Indians, is concerned.

lands or reservations of the United States within the meaning of § 4(e).

It follows that reservations of the United States, like public lands of the United States, are part of the Federal public domain. They are withdrawn from that domain and expressly reserved by the United States for some purpose. This is clear from a reading of the Public Lands Law where the phrases public lands and reservations of the United States are used many times and always in contexts which apply only to lands definitely owned by the United States.

For instance, 43 U. S. C. § 961 (66 Stat. 95) authorizes "the head of the department having jurisdiction over the lands" to grant rights of way for power purposes "upon the public lands and reservations of the United States." That section has a proviso that the right of way may be granted "through any Indian or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest." The section applies only to Federal public lands and Federal reservations and has never been applied to New York Indian Reservations.* (See Point III, *infra.*)

The United States has no proprietary interest in the Tuscarora land needed for the power project. That land does not pass the test of being part of the "public lands and reservations of the United States."

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* In *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943) the court held that the phrase "reservations of the United States" in this section did not include "lands allotted to Indians in which the United States holds title in trust only to prevent improvident alienation." In the case of allotted lands the United States holds title in trust for the Indians for a period of years. However, in making the allotment it has already given up its beneficial property interest in the land.

B

The Tuscarora land needed for the project is not part of "lands and interests in lands owned by the United States" and the doctrine of United States guardianship over Indians does not make it such.

Section 3(2) of the Federal Power Act provides:

> "(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States* and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws * * *." (Emphasis supplied.)

The definition of the word "reservations" as including "national forests, tribal lands embraced within Indian reservations, and military reservations" is limited by the phrase "and *other* lands and interests in lands owned by the United States." The intentional use of the word "other" indicates that the items preceding it are governed by the requirement of being "lands or interests in lands owned by the United States." The subdivision cannot be read in such a way as to exclude the requirement that to be a reservation land must be owned by the United States unless the word "other" is ignored completely.

The Court below concluded that even conceding the words "owned by the United States" in § 3(2) are a limitation on the terms preceding them, nevertheless "this reservation is one in which the United States has an interest" (R. 429). Although it found this interest principally in the doctrine of guardianship of the United States over Indians, it stated that "the money derived from the sale in North Carolina was handled by the United States on behalf of the Indians and was applied by the United States to the acquisition of this land" (R. 429-430).

As we point out at pages 22-24, *supra*, the part which Secretary of War Dearborn and his assistants took in the

transaction at the request of the Tuscarora did not give the United States a property interest of any kind in the land. Dearborn acted chiefly as an individual as is evidenced by the fact that when he took title to the land he executed a purchase money mortgage to the seller and when he deeded the land to the Tuscarora he gave them his personal warranty (Exh. 232-U, E. R. 197, 200). The money involved never went into the Treasury of the United States, but upon receipt from the North Carolina purchasers was turned immediately over to the Holland Land Company (R. 304-305, 310-311, 336, 340).

The Court below found that the relationship between the United States and members of Indian tribes, which "resembles that of guardian and ward", gave the United States "an interest" in respondent's reservation, sufficient to override the plain language of §§ 4(e) and 3(2) of the Act (R. 430-431).

That holding was wrong because:

(1) The purpose of guardianship over Indians is to enable the United States to protect Indians against private persons, not to protect Indians against the United States.

(2) The cases cited by the Court below show only that the United States has an *interest in litigation* involving Indian lands and a right to participate in such litigation. They have no bearing on the government's interest or lack of interest in the land itself.

(3) Guardianship over Indians has never been held to prevent the exercise of the United States' conceded power of eminent domain over Indian land, nor of a state's power of eminent domain (see Point III, *infra*).

In support of its thesis that "guardianship" gives the United States an interest in the Tuscarora land within the meaning of § 3(2), the Court below cited *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938) (R. 430). There the reservation was actually established by legislative

action on the part of the United States and the United States actually owned title to it and passed statutes specifically giving the Secretary of Interior supervision over it.

In that case the land involved had been condemned and there was no issue as to whether it was subject to condemnation. The only issue was whether the award should be paid to the United States as trustee for the Cherokee or to a utility company which claimed title under a later conveyance from the same grantor as the United States and also by adverse possession under state law. The Court found that *title to the land* was in the United States rather than the utility company.

The court did not base its decision on any principle of guardianship but rather upon the fact that the United States had acquired the earlier *legal title* which could not be divested under the state adverse possession statute. The Federal government had affirmatively taken over supervision and protection of these Indians to the extent of taking title to their land as trustee pursuant to specific authorization of Congress (43 Stat. 376), while the state had traditionally exercised no control over these lands.*

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*The United States had from 1868 affirmatively protected the interests of the Eastern Cherokee "not only with respect to the acquisition and preservation of the title to this land, but also in practically every other way imaginable," supervised their contracts, built schools, provided medical care and furnished food and clothing. Congress appropriated money for the support of the Eastern Cherokee (9 Stat. 254), enacted legislation recognizing their status as a tribe and specifically providing for their supervision by the Department of Interior (15 Stat. 228), specifically authorized a suit to recover their land after judgment had been executed against their agent (16 Stat. 362), appropriated money to pay the judgment creditor (18 Stat. 447), appropriated funds to defend a second action against their land (26 Stat. 338, 357), to settle the litigation (28 Stat. 424, 441) and to redeem the land when it had been sold for taxes (27 Stat. 348). The State of North Carolina on the other hand had done virtually nothing for the Cherokee and would not even let them attend its schools (97 F. 2d 420-421).

The Court below also referred to *United States* v. *Candelaria*, 271 U. S. 432 (1925) and *United States* v. *Sandoval*, 231 U. S. 28 (1913). These cases were part of a line of cases dealing with the Pueblo Indians of New Mexico which affirmed the proposition that the United States exercises wardship over them and has a right or duty to participate in litigation involving them or their lands. None of the Pueblo cases involved in any way the exercise of eminent domain over Indian lands by the United States or by a state.* In each case specific Federal statutes applied and mandated the Federal Government to control or supervise transactions involving the Indians.

Each time that a court held that Federal law did not apply or did not require the Federal Government's intervention as to Pueblo Indians, Congress specifically provided that in the future the Federal Government should intervene. In 1924 Congress specifically provided that no conveyance of land by any Pueblo Indian shall be of any validity unless first approved by the Secretary of Interior (43 Stat.

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*The *Candelaria* case involved a dispute between white men and Indians with respect to ownership of land. This Court held that in order for the United States, as guardian for the Indians, to be bound by a judgment in a suit to quiet title to the land it must either be a party or be represented. At the time this Court rendered its decision it was not clear to it whether or not the United States had in some fashion been represented. In a sequel to the case (*United States* v. *Candelaria*, 16 F. 2d 559 (8th Cir., 1926)) it was determined that a lawyer authorized by the Federal Government to represent the Indians and paid by the Government had appeared on their behalf in the action to quiet title. Therefore it was held the judgment in that action was binding and valid. The most recent of the line of Pueblo cases was *Alonzo* v. *United States*, 249 F. 2d 189, *cert. den.* 355 U. S. 940; *sc.* U. S. D. C. N. M. Civil No. 3407—1958 (unreported) in which individual Indians sought unsuccessfully to eject the Pueblo's lessee from part of the same land which was involved in the *Candelaria* case, which the Pueblo had occupied at least since 1769 (16 F. 2d 559), in which their title had been confirmed by Act of Congress (12 Stat. 71; 15 Stat. 342) and which was specifically made inalienable without the consent of the Secretary of Interior by the Pueblo Lands Act (43 Stat. 636).

636). Cf. *United States* v. *Joseph*, 94 U. S. 614 (1876)*; *United States* v. *Lucero*, 1 N. M. 422 (1869); *United States* v. *Santisteven*, 1 N. M. 583 (1874); *Territory* v. *Delinquent Taxpayers*, 12 N. M. 139, 76 Pac. 307 (1904); *United States* v. *Mares*, 14 N. M. 1, 88 Pac. 1128 (1907) and Act of May 29, 1872, 17 Stat. 165; Act of Jan. 30, 1897, 29 Stat. 506; Act of March 3, 1905, 33 Stat. 1048, 1069; Act of June 20, 1910, 36 Stat. 557.**

The *Candelaria* line of cases is no authority for the novel principle stated by the court below that the United States *ipso facto* acquires an interest in Indian land within the meaning of § 3(2) of the Act because of any relation of guardian and ward.

In the Tuscarora case the United States has no property interest whatsoever in the land—the only kind of interest which could be owned by the United States—and the mere fact that the United States has traditionally treated Indians as wards does not give it the property interest required by §§ 3(2) and 4(e). Neither the wardship principle nor the fact that § 177 applies to Tuscarora land

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* In the *Joseph* case this Court compared the Pueblo Indians with the New York Indians and held that a statute forbidding entry upon Indian land, which is now 25 U. S. C. 180 and which was originally passed in 1793 as part of the statute from which Section 177 is derived, did not apply either to the Pueblo Indians or New York Indians.

** The history of the dealings of Congress with New York Indians is completely opposite to the history of its dealings with the Pueblo Indians. Each time a court made a finding limiting New York's right to legislate with respect to Indians Congress has passed legislation confirming its right. (See unreported cases declaring Seneca leases invalid, discussed in a resolution of the New York legislature memorializing Congress to enact validating legislation (N. Y. Laws, 1875, p. 819) which led to the Acts of February 19, 1875 (18 Stat. 330) and September 30, 1890 (26 Stat. 558); *People ex rel Cusick* v. *Daly*, 212 N. Y. 183, 105 N. E. 1048 (1914), overruled by the Act of July 2, 1948 (25 U. S. C. § 232, 62 Stat. 1224); and *United States* v. *Forness*, 125 F. 2d 928 (2d Cir. 1942) which led to the Act of September 13, 1950 (25 U. S. C. § 233, 64 Stat. 845)).

requires giving the words of §§ 3(2) and 4(e) a meaning other than the plain meaning obviously intended by Congress.

Sections 3(1) and 3(2) were undoubtedly enacted to apply to the vast areas of land in the west where the Federal Government owned the underlying fee subject to Indian right of occupancy just as New York State owned similar land after the Revolution. The United States opened up parts of this land to private appropriation and exploitation and reserved other parts of it for other uses, including use by Indians.*

The statutory definitions in §§ 3(1) and 3(2) must be accepted. As Justice Cardozo said: "There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves". *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (1935).

C

The land here involved is not tribal land embraced within an Indian reservation.

Section 3(2), by including in the definition of the word reservations, "tribal lands embraced within Indian reservations" obviously was intended to distinguish between different types of land within Indian reservations. What Congress undoubtedly had in mind in enacting that part of the definition were Indian reservations established by treaty, executive order or Act of Congress out of the Federal public domain and subject to Federal allotment under 25 U. S. C. § 331 (24 Stat. 388). The Secretary of Interior, of course, has supervision over such reservations.

* There are vast areas of tribal lands embraced within Indian reservations which are owned by the United States and which have been withdrawn, reserved or withheld (either by statute, treaty or executive order) from private appropriation and disposal under the public lands laws (U. S. Dept. of Interior, *Federal Indian Law*, 1958 Revision p. 32).

The land within such reservations which is not allotted is held in common by the tribe and is "tribal land embraced within an Indian reservation." The United States owns the underlying fee, subject to Indian right of occupancy which the United States can eliminate even when it is protected by treaty. *Cherokee Nation* v. *Southern Kansas Railway Co.* 135 U. S. 641 (1890). If licensed under § 4(e) an annual charge is collected by the United States under § 10(e) and credited to the tribe's account with the government under § 17.*

Those parts of such a reservation which have been allotted are no longer held in common by the tribe and are, therefore, not tribal lands. While the United States holds legal title as trustee for a period of years under 25 U. S. C. § 348 (24 Stat. 389, 31 Stat. 1085), the individual allottee owns the beneficial interest. Such allotted land can be condemned by a state or municipality for any public purpose under 25 U. S. C. § 357 (31 Stat. 1084) and the compensation goes to the allottee. It may also be condemned by any licensee of the Federal Power Commission under § 21 of the Federal Power Act. Otherwise such allotted land would not be available for a power project to a licensee which is not a state or municipality.

Section 3(2) makes it clear that allotted land is not part of the public lands and reservations of the United States which § 4(e) authorizes the commission to license under the property clause. It is not tribal land embraced within an Indian reservation for which § 10(e) provides a method of fixing compensation by way of rental charges.

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* Compare 25 U. S. C. § 399 (41 Stat. 31, 1231) under which the Secretary of Interior is authorized to lease Indian land in certain western states "withdrawn prior to June 30, 1919 from entry under the mining laws". Rents received are deposited in the treasury to the credit of the Indians "subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress". (See also 25 U. S. C. §§ 398, 400, 400a, 401; 43 Stat. 244, 42 Stat. 857, 44 Stat. 300, 43 Stat. 111).

Indian land which is subject to allotment by the United States but has *not* been allotted is the type of *tribal* land embraced within an Indian reservation to which § 4(e) and the finding proviso of that section are intended to apply. Such unallotted land is property of the United States with respect to which Congress may authorize use for power projects—even when interstate or foreign commerce is not involved—and for which the United States is entitled to charge a rental as provided in § 10(e).

The Tuscarora land needed for the Niagara project is not tribal land as contemplated by § 3(2). It is true that record title to the land is in the Tuscarora Nation, but except for 45 acres it is not held in common by the tribe. The main property interests are in the individual allottees whose rights have been recognized by the courts for generations (Statement, pp. 25-28).

The bulk of the Tuscarora Reservation has been allotted under § 95 of the New York Indian Law which authorized such allotment of "tribal land" (Statement, p. 26). Section 98 makes illegal a sale of trees "on any of the tribal lands" without consent of the chiefs. In *Tuscarora Nation of Indians* v. *Williams*, 79 Misc. 445, 141 N. Y. S. 207 (1913) the Court held that an individual Indian who sold trees from land which he treated as his allotment was not guilty under that section on the ground that once allotted it was no longer tribal land.

The meaning of tribal lands in this New York statute is similar to the meaning of tribal lands in § 3(2) of the Federal Power Act.

Allotted land in the Tuscarora Reservation is tribal only in the limited sense that the Nation retains an interest because allotted property can under some circumstances revert to it. (Compare *Terrance* v. *Gray*, 171 App. Div. (N. Y.) 11, 156 N. Y. S. 916 (1916)). It is not tribal in the sense contemplated by § 3(2).

None of the members of the Tuscarora Nation earns his living from the whole reservation or from that part still

possessed by the tribe. The Tuscarora are not a tribal society. They are not nomadic. They are not herdsmen or professional hunters. They earn their living by farming, or by working outside the Reservation. Actually, only a few are still farmers and most of those who are are only part-time farmers. The bulk of them work on construction work or in factories in the industrial area adjoining the Reservation. They live in houses like other people. Their situation is the same as that of their white neighbors except that they have such advantages as tax exemption, being judgment-proof as far as their land is concerned, having free medical care provided by the State for those who want it, and having their children educated solely at the expense of the State (Statement pp. 24, 28-32).

Less then 50% of the people living on the Tuscarora Reservation are members of the tribe (Exh. 210 E. R. 73-110).

On the basis of the record as it now stands, it is clear that the Court below operated on a false premise when it said in its memorandum opinion that the Tuscarora land "is indubitably 'tribal lands embraced within Indian reservations' within the usual meaning of that phrase." (R. 429)

D

Respondent's land does not fall under the supervision of any department of the United States Government.

The limitation in § 4(e) requires that licenses issued within any reservation after a finding by the Commission shall be "subject to and contain such conditions as the Secretary of the department under whose *supervision* such reservation *falls* shall deem necessary for the adequate protection and utilization of such reservation".

There is no question whatever but that the primary power which Congress has under the *commerce* clause to deal with Indians authorizes it to pass whatever legislation it sees fit controlling dealings with Indians and establish-

ing supervision over their reservations. As we have shown in the statement, pp. 30-32, *supra*, no Federal legislation has been enacted giving any department of the United States government supervision over the Tuscarora Reservation.

Throughout its history the Federal Government has done nothing for the inhabitants of the Tuscarora Reservation. Its only dealing with the reservation involved the enforcement of the Seven Major Crimes Act until the passage in 1949 of 25 U. S. C. 232 (62 Stat. 1224) put all crimes committed on the reservation under state jurisdiction. On the other hand the State has educated the children on the reservation, has provided medical services and welfare services and has built roads and bridges all without Federal help. (Statement, pp. 30-32).

The Committee on Interior and Insular Affairs, House of Representatives, following an investigation of the Bureau of Indian Affairs, reported:

> "In the State of New York there are no services being rendered by the Bureau [of Indian Affairs] at the present time except for the annual payment of $6,000 and interest and the distribution of $4,500 worth of cloth to the various tribes. . . ." (H. Rep. No. 2503, 82d Cong., 2d Sess., p. 36).

As Chief Hill of the Tuscarora testified (R. 197) the 2½ yards of bleached muslin for each member of the Tribe is "all we get" from the Federal Government.

The Federal Government has not even had an Indian agent in New York since 1949 (*supra*, p.32).

The Tuscarora Reservation is unlike the reservations in the west created by the United States Government by treaty, executive order, or statute where supervision is established pursuant to Title 25 of the U. S. Code (e.g. §§ 25, 33; 38 Stat. 598, id. 80) and unlike the North Carolina reservation involved in *United States* v. *7405.3 Acres of Land*, *supra* where the reservation not only was established by the United States Government but where federal statutes man-

dated the Department of Interior to exercise supervision. (Act of July 27, 1868, 15 Stat. 228; Act of June 4, 1924, 43 Stat. 376). It is also unlike the Pueblo which was the subject of litigation in *United States* v. *Sandoval, United States* v. *Candelaria* and *United States* v. *Alonzo* which a Federal statute specifically placed under the jurisdiction of the Department of Interior (Pueblo Lands Act, 43 Stat. 636).

The court below in its memorandum opinion evidently took the position that § 177 of Title 25, by forbidding alienation of Tuscarora land without federal consent, in effect put the reservation under the supervision of some department of the United States Government. If that is so, the department involved is the Department of Justice and not the Department of Interior. As Assistant Attorney General Van Devanter ruled in 1900, the Department of Interior has no authority to consent to the alienation of Tuscarora land (Exh. 250 E. R. 234-238). In 1912 and 1921 the Department of Interior reaffirmed this view and in 1921 suggested that it was the duty of the United States Attorney for the Western District of New York to see to it that the land was not leased by individual Indians (Exh. 238 E. R. 215-216, Exhs. 251-253 E. R. 239-241). This was his duty because 25 U. S. C. § 175 (27 Stat. 631) directs the United States Attorney to represent Indians in suits at law or in equity.*

However, the type of obligation which the Department of Justice may have to prevent alienation of Tuscarora land certainly does not constitute supervision within the meaning of § 4(e). That section refers to property in which the United States has a proprietary interest and over which some department of the government exercises affirmative control and supervision. Obviously the statute does not intend that the Department of Justice should be charged with

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* Section 11 of the New York Indian Law requires District Attorneys to protect Indian rights to their land. In 1958, Chapter 190 of the laws of that year allowed the council, chiefs or headmen to bring an ejectment action, although the District Attorney still may do so.

imposing conditions necessary for the protection and utilization of the Tuscarora Reservation.

Chapter 12 of Title 25 authorizes the Secretary of Interior to approve many types of leases of land within Indian reservations which are subject to the allotment laws and thus have been established by the United States through treaty, Act of Congress or Executive Order. United States officials have consistently ruled over the years that these statutes do not apply to the Tuscarora Reservation. (Letter Opinion May 4, 1900, Exh. 250 E. R. 234; *id.* June 13, 1912, Exh. 238 E. R. 215; *id.* June 6, 1921, Exh. 251 E. R. 239). These officials took the position that if there was any Federal jurisdiction involved it was the jurisdiction of the Department of Justice to prevent white men from making leases banned by 25 U. S. C. § 177, 4 Stat. 730 (Exh. 251 E. R. 239).*

* The only New York reservations where leases have been authorized by the Federal Government are the Allegheny and Cattaraugus reservations of the Seneca. These reservations were established pursuant to a combination of the 1794 Treaty of Canandaigua and the 1797 "Treaty of Big Tree", which was really an agreement between the Seneca and Robert Morris on behalf of the Holland Land Company, but was made under the supervision of a Commissioner of the United States. Because there was doubt as to the validity of leases made by the Seneca of land within their reservations upon which railroads and even cities had been built, Congress at the State's request (N. Y. Laws of 1875, p. 819) in 1875 and in 1890 enacted statutes (18 Stat. 330; 26 Stat. 558) validating prior leases and authorizing future leases. Under the 1875 and 1890 statutes the leases were enforceable in the State Courts. (Act of Feb. 19, 1875, § 7). Despite this in 1942 the United States Court of Appeals for the Second Circuit in *United States* v. *Forness*, 125 F. 2d 928, held that a state statute with respect to tender before judgment was not binding on the Seneca in an action to collect rents under a lease. To offset that decision § 233 of Title 25 (64 Stat. 845) was enacted in 1950 making it clear that those leases were to be administered in the State courts under State law. This statute was drawn by State officials and enacted by Congress at the request of the State for the purpose of eliminating the confusion caused by the Forness decision. (Reports of N. Y. Joint Leg. Com. on Indian Affairs, 1948, 1949, 1950, 1951.)

Chapter 8 of Title 25 of the United States Code contains many provisions delegating to the Secretary of Interior authority to arrange rights of way for public purposes through Indian reservations. Section 323 (62 Stat. 17) authorizes him to grant rights of way "for all purposes".* But none of these provisions has ever been held to apply to New York State reservations.

In the absence of Federal statutes allowing the leasing of land within the Indian reservations (other than the Alleghany and Cattaraugus reservations) New York has enacted statutes authorizing such leasing and setting up safeguards in connection with several reservations. (It has not enacted any statute with respect to the Tuscarora Reservation.) Thus a lease for quarrying purposes in the Tonowanda Reservation was sustained in *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (2d Cir. 1944) on the theory that Congress intended to allow New York State law to prevail in connection with that reservation. In that case the Court said:

> ". . . It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U. S. C. A. § 177, R. S. § 2116. . . ." (p. 863)

The Tuscarora Reservation does not pass the test of being a reservation which falls under the supervision of any department of the United States Government and this is an additional reason why it is not the type of reservation contemplated by § 4(e) of the Federal Power Act.

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* It is significant that § 326 of Title 25 (62 Stat. 18) provides that Section 323 and related sections "shall not in any manner amend or repeal the provisions of" various sections of the Federal Power Act, including Section 21 which authorizes condemnation of land needed for power projects.

E

An examination of the Federal Power Act as a whole and particularly of §§ 10(e) and 24 demonstrates that Tuscarora land cannot possibly constitute a reservation within the meaning of §§ 3(2) and 4(e).

An examination of § 10(e) of the Federal Power Act demonstrates conclusively that the tribal lands embraced within Indian reservations referred to in § 3(2) are those which are the property of the United States. Section 3 in its very preamble states that the words defined in the section shall have the same meaning wherever used in the Act. It is clear therefore that the "tribal lands embraced within Indian reservations" which constitute "reservations" under § 3(2) are the same "tribal lands embraced within Indian reservations" referred to in § 10(e).

Section 10(e) provides "That the licensee shall pay *to the United States* reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing *it* for the use, occupancy and enjoyment of *its* lands or other property. . . ." The section goes on to establish procedures for fixing annual charges for the use of various types of government property including "tribal lands embraced within Indian reservations". It provides for the waiver of charges when property is licensed for use by states or municipalities to the extent that they sell power to the public without profit or use it for state or municipal purposes, and in the case of projects constructed by them primarily to provide or improve navigation there is no charge under any circumstances. These waivers of charges apply even in the case of Indian reservations.* The section

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* The Power Authority is a municipality as defined in § 3(7) of the Federal Power Act. (New York Public Authorities Law § 1002). It sells all its power without profit. About half the power is distributed to the public by municipal systems, rural cooperatives and private utilities. The Authority's contracts with them provide they will not make a profit although they are allowed a fair return on distribution facilities. The remainder of the power is sold by the Power Authority directly to consumers without profit. (FPC Order of Aug. 3, 1959).

goes on to provide for a waiver of charges in projects of less than 100 h.p., no matter by whom built, which produce or distribute power for domestic, mining or other beneficial purposes except in the case of "tribal lands within Indian reservations". See also § 10(i).

Section 17 provides that charges received in connection with "any Indian reservations shall be placed to the credit of the Indians on such reservation".

Section 10(e) makes it clear that where licenses are issued for the use of "lands and other property" of the United States, including Indian reservations, compensation takes the form of the payment of an annual charge to the United States for their use. They are not condemned under § 21, in which case title would pass and compensation would consist of payment of the value of the property taken. Counsel for the Tuscarora agrees that § 10(e) and not § 21 would apply if their land were licensed under the first proviso of § 4(e), and so stated on the record before the Commission (O. R. 7714).*

Section 4(e) of the Federal Power Act contemplates the licensing of projects with respect to two types of land: First, public lands of the United States and reservations of the United States; and second, non-federal lands, *i.e.*, lands not owned by the United States and in which it has no property interest.**

The Act deals with each type of land differently. *Non-federal* lands are to be acquired by a licensee by contract or

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* The Court below seems to have completely overlooked the significance of § 10(e). It evidently took the position that if the Commission made a § 4(e) finding with respect to respondent's land, it would be acting under power delegated to it by Congress under the Commerce Clause—not the Property Clause—and that the land could be condemned pursuant to § 21.

** There is a third type of project not here pertinent, *i.e.*, use of surplus water or water power from a Government dam. Compensation for use of "dams and other *structures* owned by the United States" is an annual rental governed by § 10(e).

exercise of the United States' power of eminent domain under § 21. The right of a licensee to use *federal* land if included by the Commission in an approved licensed project, is derived immediately from the license. There is no need of condemnation, since the United States already owns the land. The licensee, however, may be required to pay compensation for the use, occupancy, and enjoyment of land of the United States under § 10(e).

Obviously the only property of which the United States can authorize the licensing on an annual charge basis is property owned by the United States. When property is owned by others it may be taken from them for a public purpose but they are entitled to be compensated under the Fifth Amendment and to have the amount of the compensation fixed in a court of competent jurisdiction.

The Tuscarora do not constitute a tribe organized under Section 16 of the Act of June 11, 1934 (25 U. S. C. § 476, 48 Stat. 987; Exh. 216, E. R. 126-127) and hence the provision in § 10(e) that the fixing of charges for Indian reservation land is subject to tribal approval in the case of tribes organized under that Act would not apply to them. Therefore, if their land were covered by §§ 4(e) and 10(e), they would not even be entitled to a voice in the fixing of annual rent.

The government has no right to take land owned by Tuscarora Indians in fee and mandate that it be rented out on an annual basis, and in some cases to waive the annual charge. This would be a denial of due process not only as far as the nation owning the record title is concerned but also as far as individual allottees owning houses on and property interests in the land are concerned. *United States* v. *Creek Nation*, 295 U. S. 103 (1935); *Jones* v. *Meehan*, 175 U. S. 1 (1899).

Assuming, however, that the Commission made a § 4(e) finding that the licensing of the land would not be inconsistent with the purpose for which the reservation was

acquired, its action would at best give the licensee a mere naked license authorizing use of Tuscarora land as far as the Commission is concerned. The Commission would have no authority to put the licensee in possession of the land and there is no statute which provides a method by which the licensee could get possession.

In the case of lands owned by the United States, once a license has been issued under § 4(e) the licensee may enter upon "any lands of the United States included in any proposed project" under the authority of § 24 upon complying with the terms of that section, including putting up a bond to pay for any damages caused to others whose prior rights to use the property are being extinguished. Section 24 beyond any doubt whatever applies only to property owned by the United States. If the government property involved happens to be Indian reservation land, § 24 nevertheless provides a method of obtaining possession for a Federal Power Commission licensee. The Indians have a right to be compensated for the use of the land which is taken from them by the payment of an annual charge under § 10(e) (except in cases where the charges are waived) and under § 24 have a right to be paid for the betterments they have placed on the property. The Indians' right to use lands of the United States can be legally taken from them by the government and transferred to the Federal Power Commission licensee for the duration of the license. *Henkel* v. *United States*, 237 U. S. 43 (1915).

The situation is completely different with respect to land owned by an Indian Nation in fee. The only way such land can be taken is by eminent domain, with all the guarantees of the Fifth Amendment.

Thus the Federal Power Act taken as a whole makes it clear that Tuscarora land is not a reservation within the meaning of § 4(e).

F

Administrative interpretation as evidenced by regulations adopted by the Commission and prior administrative holdings of the Commission and the Interior Department demonstrate that respondent's land is not a reservation within the meaning of § 4(e).

The 1957 Niagara Redevelopment Act directed the Commission to issue petitioner a Niagara license " in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." The Commission's "Rules of Practice and Procedure" in turn require that applications for licenses conform to the Commission's "Regulations Under the Federal Power Act" (18 C. F. R. 1.5 (b) (3)).

The "Regulations under the Federal Power Act" show that the Commission has consistently interpreted the phrase "reservations of the United States" in § 4(e) as referring only to lands in which the United States has a property interest. They require an applicant for a major license to show:

> (a) "the lands and reservations *of the United States* which will be affected by the project" (18 C. F. R. 4.40 (g));
>
> (b) "full details as to the lands owned by applicant, and as to applicant's plans for acquiring title to or the right to occupancy and use of lands *other than those owned by the applicant or by the United States*, necessary or essential for carrying out the project covered by the application" (18 C. F. R. 4.41 (F));
>
> (c) "state and county lines, *reservations of the United States*, towns, streams . . ." (18 C. F. R. 4.42 (J));
>
> (d) ownership and right of occupancy of lands within the project area including "reservations (indicating separately each reservation) and public lands (*indicating separately lands, full title to which*

remains in the United States and lands in which the United States retains only an interest") 18 C. F. R. § 4.42 (K);

(e) "state, county and town lines and boundaries of *reservations of the United States* (18 C. F. R. 4.42 (f));

(f) "if the project affects unsurveyed public lands or reservations, the protraction of townships and section lines * * * such protractions whenever available to be those recognized by the agency of the United States having jurisdiction over the lands" (18 C. F. R. 4.42 (g)). See also 18 C. F. R. 4.70 (d), 4.82 (R), 11.22.

The forms of application prescribed by the Commission for major license applications (18 C. F. R. 131.2) and for preliminary permits (18 C. F. R. 131.10) both require the following statement:

> "*Lands of the United States* which will be affected are located in: . . . (State whether in public domain, national forests, *Indian reservations*, giving the names of forests or reservations)".

Administrative action in connection with petitioner's application for a Niagara license has uniformly construed respondent's land as not constituting a reservation within the meaning of § 4(e).

During the course of the hearing conducted by the Commission in the fall of 1957 the Department of Interior made an administrative determination that Tuscarora land is not a reservation within the meaning of § 4(e). (Exhs. 212, 215, 217; F. R. 117, 125, 128.)

During the course of the 1957 hearing the staff of the Federal Power Commission took the position that a § 4(e) finding was not necessary.

Counsel for the Tuscarora evidently took the same position because although on November 25, 1957 they filed a petition on behalf of the Tuscarora for leave to intervene in

the license proceeding (which was granted on December 9), and on January 2, 1958, filed a brief with the Commission asking that Tuscarora land be excluded from the project, they made no claim that the finding provision of § 4(e) applied until February 28, 1958 when they petitioned for rehearing with respect to the Commission's January 30th order.

On March 21, 1958 the Commission made an administrative determination as a result of the rehearing application that the Tuscarora's land is not a reservation within the meaning of the finding provision of § 4(e).*

The Court below erred in holding that respondent's land is "tribal lands embraced within Indian reservations". It erred in holding that respondent's land is a "reservation" within the meaning of § 3(2) of the Act. It erred in holding that—because Indians are in some respects wards of the United States—respondent's reservation is "one in which the United States has an interest" such as to bring it within the meaning of § 4(e).

Respondent's land does not come within that meaning because it is not a reservation of the United States, the United States does not own it or have any proprietary interest in it, it was not withdrawn from appropriation under the public land laws (and indeed was never part of the public domain) and it does not fall under the supervision of any department of the United States government.

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* The Court of Appeals for the Second Circuit, both in its July 24, 1958 order declaring that Tuscarora land could be condemned under § 21 of the Federal Power Act and in its August 26, 1958 order denying reargument necessarily determined that the § 4(e) provision did not apply. The argument that § 4(e) did apply was made by counsel for the Tuscarora in their original brief, on oral argument, and as a ground for their petition for rehearing.

POINT II

Even if respondent's land were a reservation within the meaning of § 4(e), the court below erred because (i) its final judgment, in denying petitioner's right to condemn respondent's land, frustrates the mandate of Congress that the project be capable of utilizing all Niagara water and (ii) the Niagara Redevelopment Act precludes the application of the finding clause of § 4(e).

Congress through the Niagara Redevelopment Act mandated the licensing and construction of a project capable of making practical use of all the Niagara water available to the United States. The judgment below frustrates this Congressional mandate because, although it approves the license for a project which includes respondent's land and thus is capable of utilizing all the water, it goes on to deny the licensee the right to condemn that land. In practical effect it makes it impossible to build a project capable of using all the water as directed by Congress.

The reason ascribed by the court below for its action was that a § 4(e) finding has not been made. This was error because the Niagara Redevelopment Act precludes the application of the finding clause even assuming that respondent's land constitutes the type of reservation described in that clause.

The finding clause in § 4(e) is a limitation on the Commission's power to issue licenses on public lands and reservations of the United States in the ordinary case where the Commission's power to issue a license is derived solely from § 4(e) of the Federal Power Act. That limitation is inapplicable where, as here, issuance of a license to a particular licensee for a specified project is made mandatory by special Act of Congress. The 1957 Act in mandating a project able to make full use of the water available gave the Commission all the power it needed to issue the Niagara license thereby

superseding § 4(e) at least to the extent of any conflict between the two Acts.* If the limitation on the Commission's power to issue a license under § 4(e) were to prevent it from issuing a license with respect to land needed for the project such a conflict would result.

As we have shown in the Statement p. 40-42, *supra*, respondent's land is absolutely needed for the Niagara Project if it is to be capable of utilizing all the Niagara water available to the United States. The court below was wrong in its November 14 opinion when it said:

> "It does not appear that the acquisition of Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope".

Evidence put in the record after the court made that statement showed unequivocally that the size of the reservoir and the power capacity of the project will have to be reduced if respondent's land is not available (R. 225-227, 284-285).

As we have also shown in the Statement, p. 7, *supra*, a reservation to the 1950 Treaty (1 U. S. T. 694) forbade the Commission to issue a Niagara license pursuant to § 4(e) by requiring specific Congressional action authorizing the project. The Court of Appeals for the District of Columbia Circuit held that this reservation was ineffective and reinstated petitioner's 1956 application which had been filed under § 4(e) and dismissed by the Commission (*Power Authority* v. *Federal Power Commission*, 247 F. 2d 539). After the Niagara Redevelopment Act was passed this Court vacated that judgment as moot even though a Niagara license which had already been issued to petitioner was based on that application as amended. (*American Public Power Association* v. *Power Authority*, 355 U. S. 64).

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* The 1957 Act by directing the Commission to issue a license to the Power Authority also superseded § 7(a) of the Federal Power Act which directs the Commission in issuing licenses to give certain preferences among applicants and to decide on the relative merits of plans of development proposed by different applicants.

The 1957 Act directed the Commission to issue the license in conformance with the Commission's Rules of Practice and Procedure and prescribed that in case of conflict the Act was to prevail. Nothing in those Rules limited the Commission's power to license the use of Indian reservation land.

The 1957 Act directed the Commission to include in the Niagara license the conditions required by the 1957 Act and also those required and deemed necessary under the Federal Power Act.

The conditions prescribed in the 1957 Act itself had to do with power marketing and placed no limitation on the Commission's authority to license the use of any land needed for the project.

The conditions prescribed in the Federal Power Act are contained in § 10 and the most important is the one in § 10(a) which requires "that the project adopted, including the maps, plans, and specifications shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing" the waterway. On February 2, 1959 the Commission without dissent stated that if the project does not include sufficient land to provide a 60,000 acre foot reservoir compliance with that condition cannot be had (R. 486-494).

Like the conditions prescribed in the 1957 Act itself, none of the conditions required by the Federal Power Act places any limitation on the Commission's authority to license any land needed for the project.

It is clear that Congress by the 1957 Act made the finding proviso of § 4(e) inoperative with respect to the Niagara Project, and that the judgment of the court below frustrates the mandate of Congress.

POINT III

The Court below erred in directing the Commission to amend the license to exclude specifically the power of the Authority to condemn respondent's land since Congress has consented to the exercise of such power and no treaty or statute forbids it.

The Authority's power to condemn land—including Indian land—needed for the Niagara Project is not something which the Commission can grant or take away. Since the power of condemnation is not found in the license, such power cannot be excluded from the license.

Assuming that the court below in ordering such exclusion meant that the Commission should add to the license an affirmative provision denying to the Authority the right to condemn (as distinguished from the right to purchase) respondent's land which is covered by the license which the court approved, this directive was nevertheless wrong since statutes give the Authority the right to condemn the land, Congress has consented to its doing so and no treaty or statute forbids it.

The Court of Appeals for the Second Circuit found Congressional consent to the condemnation of respondent's land in the Niagara Redevelopment Act and held that such condemnation could be accomplished under Section 21 of the Federal Power Act. That Court further held that such Congressional consent was properly to be inferred from the size and extent of the project, the legislative history of the 1957 Act and the Act itself. *Tuscarora Nation of Indians v. Power Authority, et al.*, 257 F. 2d 885 (1958), reh. den. 257 F. 2d 895, cert. den. 358 U. S. 841 reh. den. 360 U. S. 923.

In direct contradiction to the prior binding adjudication of the Second Circuit Court of Appeals, the court below held that the Congress had not by the Niagara Redevelop-

ment Act given consent to the use of Tuscarora land for the Niagara project.

The November 14 opinion of the court below shows that its holding that the Niagara Redevelopment Act did not constitute such consent was based on several factual errors.

As we have shown in Point II, the court was wrong when it assumed that Tuscarora land was not necessary for the project.

The court was also wrong when it said (R. 425-426) that Congress was not advised of the possibility that Indian reservation lands might be sought as the site of part of the project. Actually, the Authority's plans to use Tuscarora land were open and notorious at the time of the Senate Public Works Committee 1957 hearings and material submitted showed the reservoir in part on Tuscarora land although ownership of none of the property needed for the project was indicated (Statement, pp. 33-34). In addition, a representative of the Seneca Indians testified before committees of both houses of Congress that the Senecas still owned land which had been reserved to them under the 1794 Treaty of Canandaigua and which was to be the site of the intake works and part of the waterway of the project and a member of the House Committee observed that Indian land could be condemned for the project.* (Statement, pp. 35-37).

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* Land within the Mile Strip and on Connors Island (centerfold map) needed without question for the intake works and waterway was *reserved* to the Seneca by the 1794 Treaty of Canandaigua. New York State brought out the Senecas' right of occupancy to part of that land in 1815 at a treaty at which no federal representative was present (N. Y. Ass. Doc. No. 51, 1889 (211-213)) (Statement, pp. 29, 36). Certainly it could not be reasonably argued that Congress failed to consent that this property which is so obviously vital to the Niagara Project be licensed by the Commission and its use acquired by the licensee without a § 4(e) finding. The principle is the same with respect to the respondent's land needed for the reservoir if the Congressional mandate for utilization of the water is to be obeyed.

The Court below in its November 14 opinion said:

> "Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: 'No dams or provisions for storage of water are necessary.' This testimony related to the project as planned prior to the Schoellkopf disaster, but we are not advised that the impression given was ever withdrawn or changed."

The reports of both the House and Senate Public Works Committees talked about the need of a storage reservoir and it is clear that what Senator Chavez meant was that there was not to be a reservoir created by damming a river. The Great Lakes constitute a natural reservoir but a provision of the 1950 treaty with Canada makes a pump storage reservoir absolutely essential (Sen. Rep. No. 539, 85th Cong. 1st Sess. p. 5; H. Reps. No. 862, 85th Cong. 1st Sess. p. 6, Statement, p. 6).*

The court below showed a complete misunderstanding of the facts when it said that Congress did not intend "to save costs to its sole licensee . . . at the expense of Indians living on an Indian Reservation." There is of course no suggestion in the record that the Tuscarora would not be fairly compensated for any land taken for the project. On the contrary, two members of the Commission described the offers made to them (including an identical amount of land better than that which would be taken) as "an unprecedented opportunity to advance whatever way of life they had been following." (R. 493).** It is true that any condemnation award or settlement with the Tuscarora would be much less expensive than an attempt to use alternate land. The resulting saving to petitioner—a non-profit organization—would

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* See Minority Report by Senators Chavez, Gore and Morse on S. 2599, S. Rep. 2501, 83rd Cong. 1st Sess., p. 24. All proposed projects for Niagara development have included a pump storage reservoir. (*Id.*, p. 5, Statement, p. 3).

** The majority of the Commission said that relocation of the Tuscarora on substitute land represented "an equitable solution", but found this possibility immaterial. (R. 485). Only 37 dwellings would have to be moved (p. 29, *supra*).

accrue to its customers. Such saving would be in accord with the express mandate of Congress that petitioner make power available to domestic and rural consumers "at the lowest rates reasonably possible" and restore low power costs to industry "as nearly as possible." (16 U. S. C. § 836(b)(1) and (3)).

The court below erroneously stated:

> "During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company." (R. 426)

Niagara Mohawk owned only 42% of the land needed for the project (R. 290; Exh. 18, E. R. 11). An Army Engineer did give erroneous testimony before the House Committee on Public Works in 1956 to the effect that Niagara Mohawk Power Corporation "generally" owned all the land needed for a smaller project designed by the Army Engineers before the Schoellkopf disaster. That project was smaller than the Authority's project concerning which testimony was given at the same hearing and evidence was presented at the hearing that even the latter project would have to be enlarged as a result of the Schoellkopf disaster. Even for the smallest of the planned projects, the engineer's testimony was incorrect (R. 289-290; Item I, pp. 2-5).

At the hearing attempts were made through questioning a Power Authority witness to show that Niagara Mohawk in fact owned the property needed for the project. This witness at all times refused to testify that this was so and the transcript of the testimony indicates clearly that the congressmen did not believe it to be so (R. 257-262).

As a matter of fact, the Power Authority's witness testified that there were four different methods by which the Power Authority could acquire land needed for the project. These included the Federal Power Act procedure and three procedures under State law. The witness testified that the

Authority could condemn whatever land was necessary for the project regardless of who owned it (R. 257-258, 261).

The prior determination by the Second Circuit Court of Appeals was clearly correct. The record makes plain that at the time Congress passed the special Act—not only consenting to the project but mandating the issuance of a license for it to the Authority—Congress was aware of the urgent necessity for the pump-storage reservoir as an essential component of the project and had data before it showing the only feasible location of the reservoir to be in part *on Tuscarora land.*

As we have shown in the Statement (pp. 33-42), when Congress passed the 1957 Act it had before it a record which showed that:

(1) a storage reservoir was completely essential if the project were to have a firm capacity of 1,800,000 kilowatts as represented (pp. 33-34);

(2) in order to utilize all the water of the river, about 20,000 c. f. s. of which became available as a result of the Schoellkopf disaster, the size of the storage reservoir would have to be increased so that instead of having a capacity as low as 22,000 acre feet covering 650 acres, it would have to have a capacity of 60,000 acre feet and cover a larger acreage which obviously would amount to about 2,500 acres (pp. 38-39);

(3) the Seneca Indians claimed to own land completely essential for the project (pp. 35-37);

(4) the reservoir would be in close proximity to the City of Niagara Falls but would nevertheless be built in open country (p. 34). (The only open country on which the reservoir could be built includes Tuscarora land (p. 34).);

(5) the reservoir as pictorially shown on documents submitted would take in an area between Upper Mountain Road and Saunders Settlement Road which, in fact, in-

cluded Tuscarora land although the ownership of none of the land needed was indicated (pp. 33-34, 39-40);

(6) the Power Authority considered that it had the right to condemn whatever land was necessary for the project regardless of its ownership, either under the Federal Power Act or under state procedures (p. 38);

(7) the cost of construction of the project was the controlling factor in determining the cost at which power could be produced (p. 41);

(8) the production of cheap power was essential to the survival of existing industry in the Niagara area (p. 34);

(9) the project needed to be built quickly to relieve a serious power shortage in the area which resulted from the Schoellkopf disaster and which had an unfortunate economic effect on the area (pp. 38-39);

(10) the project was a gigantic one and although the Power Authority had developed the most up-to-date plan of development it was desirable to leave to the Federal Power Commission the task of passing on the design and precise location of the project features (p. 34).

The legislative history of the Niagara Redevelopment Act shows clearly that Congress intended that whatever land is necessary for the project be available to it. As we have shown, Tuscarora land is necessary if the project is to be capable of utilizing all the Niagara waters available to the United States as mandated by the 1957 Act and if it is to comply with Section 10(a) of the Federal Power Act.

No reasonable interpretation can be made of the Niagara Redevelopment Act and Section 21 of the Federal Power Act taken together except that Congress authorized the taking of Tuscarora land for the project.

Particularly is this so because under the true rule of construction enunciated by this Court, Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted therefrom. *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943); *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418 (1935); *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S.

575 (1928); *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916); *Barker* v. *Harvey*, 181 U. S. 481 (1901); *Albany* v. *United States*, 152 F. 2d 266 (6th Cir. 1945); *Bailey, et al.* v. *United States*, 47 F. 2d 702 (9th Cir. 1931); *Y-Ta-Tah-Wah* v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900).

The Niagara Redevelopment Act (like the Federal Power Act) is the broadest type of statute in purpose and scope and is directly analogous to the Internal Revenue Code which was held in *Five Civilized Tribes, supra*, to include the land and income of even a restricted Osage Indian within its scope. As this Court held in *Five Civilized Tribes*, where—as here—the language of a general act and the public policy underlying it are broad enough to include them, Indians must be specifically and unequivocally *excluded* to be exempt from its terms and conditions.

Nor does the fact that the finding provision of § 4(e) is inapplicable to the Tuscarora Reservation mean that there is not also consent to the taking of Tuscarora land in the Federal Power Act itself. Sections 3(2), 4(e), 10(e), 17 and 21 taken together are the clearest possible evidence that Congress had in mind the problems of Indians and the guardianship of the United States over them when it passed the Federal Water Power Act. Its silence with respect to those Indians who, like the Tuscarora, do not live on reservations of the United States, or who live on allotted land within such reservations, must be taken as an indication that "they had no claims which called for special protection" (*Barker* v. *Harvey*, 181 U. S. 481, 492-493 (1901)). Under § 21, their lands are accorded the same protection as those of other citizens, and this Congress deemed sufficient (55 Cong. Rec. 1565).

In *Barker* v. *Harvey, supra*, this Court was called upon to consider whether Congress had intended to include Indians within the scope of an act invalidating Mexican grants to lands in California not claimed within two years of the act. It held that the failure of Congress to exclude Indians, commonly known to be residents of the geographic area affected by the act, from the scope of the act evidenced an intent to have them *included* within its scope. In holding

an Indian within the scope of, and barred under, the terms of the act; the Court stated:

> "[A]s no action has been shown in relation to these particular Indians, or their claims to these lands, *it is fairly to be deduced that Congress considered that they had no claims which called for special action.*" (pp. 492-93) (emphasis added)

Congress clearly manifested an intent by the enactment of the Niagara Redevelopment Act as well as by § 21 of the Federal Power Act that whatever land was necessary should be available for the Niagara Project, including Indian land. It therefore authorized the Commission to license such land and consented to its condemnation.

In addition, the State of New York on petitioner's behalf has tacit Congressional consent to acquire that land for a public purpose as it has done with respect to Indian land within its borders since the Revolution because no federal treaty or statute bars its doing so.

The Power Authority is an arm of the State of New York and while the Congress under the commerce clause has undoubted power to forbid New York State from exercising eminent domain over Indian land within its borders it has not done so. On the contrary it has at least tacitly consented to New York's exercise of such power on behalf of itself and its subdivisions. The court below evidently took the position that 25 U. S. C. § 177 and 233 forbid New York's exercise of such power without specific Federal consent.

Prior to this litigation, Section 177 was never held to apply to the exercise of eminent domain over Indian land in New York either by the Federal Government or by the New York State Government.

The following authorities sustain such power in the State: *Wadsworth* v. *Buffalo Hydraulic Assoc.*, 15 Barb. 83 (N. Y. Sup. Ct., Niagara Co., 1853); *O'Meara* v. *Comrs.*, 3 Thomp. & Cook 235, revd. on other grounds in 59 N. Y. 316 (1874); *France* v. *Erie R. Co.*, 5 Thomp. & Cook 12 (1874); *Jemison* v. *Bell Telephone Co.*, 186 N. Y. 493, 79 N. E. 728 (1906); *Button* v. *Snyder*, 7 F. Supp. 597 (W. D. N. Y. 1934); *United States* v. *Cattaraugus County*, 71 F.

Supp. 413 (W. D. N. Y. 1947); *Dixon* v. *State*, 4 Misc. 2d 76, 155 N. Y. S. 2d 723 (1956); *Jones Cut Stone Co.* v. *State*, 7 Misc. 1048, 166 N. Y. S. 2d 742 (1957); Nichols, *Eminent Domain*, § 2.224 (1950).

Indeed, § 177 has never been held even to apply to the purchase of land by New York in its proprietary as distinguished from its sovereign capacity. *U. S.* v. *Franklin County*, 50 F. Supp. 152 (N. D. N. Y. 1943); *St. Regis Tribe* v. *State of New York*, 5 A. D. 2d 117, 168 N. Y. S. 2d 894 (1957) aff'd 5 N. Y. 2d 24 (1958), *cert. denied* 359 U. S. 910, *reh. denied* 359 U. S. 1015 (1959).*

Title to large and important tracts in New York State is held under purchases which New York made in its proprietary capacity at no less than 39 treaties held after the present language of § 177 was adopted with no commissioner of the United States present. N. Y. Assem. Doc. No. 51, 1889, pp. 190-211.

Since the Revolution New York has openly and notoriously condemned Indian land for public purposes without Congressional authorization and Congress has never passed any legislation forbidding it.**

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* The first Indian Non-intercourse Act (1 Stat. 138) adopted in 1790 and by its terms operative for less than three years forbade states to buy out Indian land rights except under Federal auspices. The succeeding statute (1 Stat. 329) adopted in 1793 eliminated that provision and substituted the language of the present § 177 which is derived from it. The provision allowing states to buy Indians' rights if present at a treaty held by the United States has never been held to provide an exclusive means by which the states could make such purchases. § 4 of the 1790 Act and the corresponding section of the 1793 Act are printed as Appendix B to this brief.)

** During the period when the Indian Non-Intercourse Acts were enacted in 1790, 1793, 1802 and 1834 (1 Stat. 138; 1 Stat. 329; 2 Stat. 139; 4 Stat. 729; 25 U. S. C. § 177), the United States was held not to have power of eminent domain (*Pollard's Lessee* v. *Hagan*, 44 U. S. 212 (1845)). Until 1876 when the United States was first held to have that power, *Kohl* v. *United States*, 91 U. S. 367, only the state could condemn Indian land. A 1927 Act of Congress (44 Stat. 932) recognized and treated as valid New York's prior condemnation of part of The Oil Spring Reservation for canal purposes.

In *United States* v. *Cattaraugus County*, *supra*, Federal officials unsuccessfully challenged New York's right to condemn Indian land, and in *United States* v. *Franklin County*, *supra*, unsuccessfully challenged its right to purchase it without Federal consent. In each case they relied on Section 177. The United States did not appeal in either case.

As we have shown (pp. 56, 63, *supra*), 25 U. S. C. § 233 was drafted and sponsored by New York State officials to overcome the confusion caused by the decision in *United States* v. *Forness*, *supra*, in relation to leases on the Seneca Indian land. It was not intended to make any substantive changes in the law, and as the New York Attorney General said it did not add or detract from the State's power of condemnation over Indian land. 1950 Op. Att'y Gen. (N. Y.) 206.*

As the District Court said with respect to 25 U. S. C. § 233 in *Tuscarora Indian Nation* v. *Power Authority*, *supra*:

> "If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress." (164 F. Supp. 107, 116)

In support of its holding that New York cannot acquire respondent's land on behalf of the Power Authority without

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* While the bill with the alienation proviso in it was pending in Congress, the decision in the *Cattaraugus* case was handed down sustaining the State's right to condemn Indian land and holding that the United States did not need to be a party. Certainly the New York officials who drafted and sponsored the legislation did not believe it would overrule that decision and there was no suggestion from any quarter that it would.

specific federal consent the court below cited *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938); *United States* v. *Candelaria*, 271 U. S. 432 (1926); *United States* v. *Sandoval*, 231 U. S. 28 (1913); Cohen, *Federal Indian Law* 321 (4th ed. 1945); 18 Ops. Att'y. Gen. 235 (1885).

None of those authorities supports that proposition.

As we have shown, pp. 53-54, *supra*, in *United States* v. *7,405.3 Acres of Land*, the Indian land involved, title to which was in the United States, had already been condemned and the question presented was as to who was entitled to damages. There was no controversy concerning the right to condemn the land.

As we have also shown, (pp. 55-56) the *Candelaria* and *Sandoval* cases did not involve condemnation in any way, but did involve the government's right to participate in litigation between private persons and Indians concerning their land and there were specific statutes giving the government such right.

The passage from Cohen and the Attorney General's opinion cited by the court (R. 424) had nothing to do with condemnation.*

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* While the passage cited does not refer to eminent domain, see Cohen said at page 309:

> "Even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state."

It is significant that Cohen did not cite a single case to sustain this proposition and no case has been found which sustains it. Cohen's statement is repeated word for word in the 1958 revision of the Handbook (U. S. Dept. of Interior, *Federal Indian Law*, (1958) at p. 639) but the new edition not only fails to cite any cases in support of the statement, but omits to cite *United States* v. *Cattaraugus County*, *supra*, which holds to the contrary with respect to New York reservations.

(Footnote continued on next page)

It is clear that whatever Congressional consent was necessary for the taking of Tuscarora land for the Niagara Power Project was provided not only by the Niagara Redevelopment Act and the Federal Power Act but also by the course of dealings between Congress and New York State for 150 years.

In the 1945 edition Cohen also made the statement:

> "While tribal lands are, like other lands, subject to the Federal power of eminent domain, they are not subject to the state power of eminent domain except where Congress has specifically so provided". (p. 310).

To support this statement he cited *United States* v. *Minnesota*, 95 F. 2d 468 (8th Cir. 1938), aff'd *sub nom. Minnesota* v. *United States*, 305 U. S. 382 (1939) and *United States* v. *Colvard*, 89 F. 2d 312 (4th Cir., 1937).

The *Minnesota* case involved condemnation of allotted land by the state pursuant to 25 U. S. C. § 357 (31 Stat. 1084) which authorizes states and municipalities to condemn Indian allotted land for any public purpose. The ultimate decision in the *Minnesota* case was that since the United States was the owner of the fee as trustee for the allottee, it was a necessary party defendant. Cohen neglected to cite the Court of Appeals decision, after remand, granting condemnation and overruling its own prior decision that consent of the Secretary of Interior was necessary. 113 F. 2d 770 (1940).

The *Colvard* case involved the same eastern band of Cherokee Indians which were involved in *United States* v. *7,405.7 Acres of Land*, 97 F. 2d 417 (4th Cir., 1938) cited by the court below in its memorandum opinion. In that case the United States sought an injunction against Colvard from using a right-of-way across Cherokee land for his private purposes which he claimed a right to do under a condemnation proceeding in the state court. The injunction was granted on the ground that the United States was "the holder of the title to the lands in question, was not made a party to the proceedings in the state court, and consequently is not bound by those proceedings had behind its back".

In granting the injunction the court said:

> "A right-of-way could no more be acquired over these lands by proceedings against the Indians than title to lands embraced in a government forest could be tried by suit against the forester, nor than post office property could be condemned for purposes of a street by proceedings against the postmaster." (pp. 314-315).

POINT IV

The court below should not have allowed respondent to relitigate issues already concluded in a prior action brought by respondent in a forum of its choice.

On February 28, 1958 respondent petitioned the Commission for rehearing on its January 30 licensing order and for modification of that order to exclude its lands from the scope of the license. It stated that it was "aggrieved . . . by the mere fact that its property *may* be included in the Niagara Project".

It said that although in the January order the Commission had refused to pass on the Authority's legal right to acquire respondent's land, the issuance of the license might be construed as giving federal consent to the acquisition of its lands in the light of § 21 of the Federal Power Act. Respondent said that the law was unsettled as to whether general legislation like § 21 constitutes authority from the United States. It said there were no decisions on the point.

Respondent also asked exclusion of its land from the license on the ground that no § 4(e) finding had been made.

On March 18, 1958 respondent moved the Commission for a stay pending decision on the application for rehearing because petitioner had obtained an order from a State court for the taking of depositions of officers of the tribe as to the names and interests of individual allottees preparatory to starting a condemnation action.

On March 21 the Commission denied the application for rehearing and held that (i) the question of whether petitioner was empowered to acquire respondent's land by eminent domain was one to be resolved by a court of competent jurisdiction; (ii) respondent's lands are not part of a reservation within the meaning of § 4(e) of the Federal Power Act; (iii) respondent's land constituted the best location for the storage reservoir. It dismissed the applica-

tion for a stay pending decision on the rehearing application saying it had not had time to consider the stay application before it actually made the decision on the rehearing.

At that point respondent was in a position where it could apply for court review of the January 30 order any time within 60 days.

Immediately after the Commission's denial of the rehearing application, petitioner started a condemnation action in a state court and respondent moved to dismiss it. On April 11, and before argument on the motion, a state statute was enacted allowing petitioner to acquire land for the Niagara Project by the appropriation method of eminent domain as it had on the St. Lawrence and petitioner discontinued the condemnation action and on April 15 took steps to acquire respondent's land by the appropriation method.

On April 19, respondent, which had not yet sought review of the January 30 order, brought an injunction and declaratory judgment action in a United States District Court of the Second Circuit and obtained a stay of the appropriation proceeding. It asked for a judgment declaring that petitioner "has no right, authority or power to acquire by appropriation or otherwise" any land belonging to respondent.

In its complaint respondent alleged that the action was brought under 28 U. S. C. §§ 2201 and 2202 and that:

> "An actual controversy exists between plaintiff and defendants, which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest. Further, said actual controversy admits of an immediate and definitive determination of the legal rights of the parties, and of the public interest and admits of specific relief through a decree of conclusiveness as appears at length from the following".

25 U. S. C. § 2201 provides that in the case of an actual controversy within its jurisdiction, except with respect to

federal taxes, a United States court may declare the rights and other legal relations of the parties whether or not further relief is or could be sought. Rule 57 of the Federal Rules of Civil Procedure provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief and also provides that the court may order a speedy hearing.* Respondent not only alleged in its complaint that the court had jurisdiction and power to grant the relief sought, but submitted a memorandum to the District Court to sustain that proposition.

Respondent did not commence a review proceeding until May 16, nearly a month after it had brought the declaratory judgment action and after 56 of the 60 days allowed by law for filing a petition for review had expired. Instead of bringing the proceeding in the Second Circuit where its declaratory judgment action was pending it brought it in the court below and there contended as in the Second Circuit action that petitioner "lacks power to acquire" respondent's land "without specific permission from Congress, which permission has not been requested or granted."

Respondent sought review only of the January 30 order of the Commission and did not seek review of the May 5 order approving Exhibit J to the license which for the first time affirmatively included respondent's land within the licensed project area (Statement, pp. 10, 12). In fact, respondent did not even seek rehearing on that order although by its terms it was to become final in 30 days unless rehearing was requested.

* The Authority was able to obtain speedy hearings in both the District Court and the Second Circuit Court of Appeals in the declaratory judgment action. Conversely, respondent was able to delay the review proceedings so that even an interlocutory decision was not obtained with respect to the January 30 order until November 14, although against respondent's opposition the court advanced the schedule.

On June 24, the day before the court below acquired jurisdiction* in the review proceeding through the Commission's filing of the transcript of the record with it, the District Court for the Western District of New York rendered judgment dismissing the injunction and declaratory judgment action on the merits thus overruling the respondent's contentions that petitioner had no right to acquire its land. The District Court dismissed the stay previously granted.

Respondent did not seek a stay in the District of Columbia Circuit but did obtain a stay from the Second Circuit Court of Appeals and prosecuted there an appeal from the District Court judgment.

On July 24 the Second Circuit Court of Appeals entered a declaratory judgment to the effect that Congress through the Niagara Redevelopment Act consented to the use of respondent's land for the Niagara Project and that petitioner has the right to condemn it under § 21 of the Federal Power Act. By this judgment and by its denial of rehearing on August 26 that court necessarily overruled respondent's contention that a § 4(e) finding was necessary. In denying rehearing the court also overruled the contention —then made for the first time—that only the District of Columbia Circuit could decide the question of petitioner's right to take respondent's land located in the Second Circuit.

It was against this background and after this Court denied certiorari to the Second Circuit, that the court below made its November 14 holdings on the basis of contentions which the Second Circuit had rejected.

The court below erred by failing to give recognition to the prior judgment of the Second Circuit Court of Appeals

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*The Court had not theretofore acquired any jurisdiction. This is made clear by the Amendment of § 313(b) of the Federal Power Act by the Act of August 28, 1958 (Public Law 85-791). Since that amendment a court in which a petition to review a Federal Power Commission order is filed obtains jurisdiction upon filing the petition and obtains exclusive jurisdiction when the Commission files with it a transcript of the record.

with respect to questions common to the litigation in both courts. In directing the Commission to amend its licensing order so as to "*exclude specifically the power* * * *to condemn*" respondent's lands it flatly contradicted the prior judgment of the Second Circuit Court that petitioner "as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 is *authorized to exercise the right of eminent domain* according to the procedures specified in Section 814 [§ 21] of the Federal Power Act." *Tuscarora Indian Nation v. Power Authority*, 257 F. 2d 885, 894.

Unless the principle that there should somewhere be an end to litigation and that there should be finality of judgment is discarded, a court which obtains "exclusive jurisdiction to affirm, modify or set aside" an administrative order should nevertheless respect and be bound by prior adjudications of a sister court of competent jurisdiction with respect to issues, the resolution of which is necessary to determine whether or not to affirm, modify or set aside the order.

As this Court said in *Angel v. Bullington*, 330 U. S. 183, 192-193:

> "The doctrine of res adjudicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion".

In this case the court which entertained the declaratory judgment action had undoubted jurisdiction under all the circumstances to determine whether or not Congressional consent was required for the condemnation by the Power Authority of respondent's land, and if so whether such consent had been granted and if granted whether a § 4(e) finding was necessary to make it effective.

These issues were decided and judgment entered with respect to them prior to the time the court below obtained

jurisdiction in the review proceeding by the Commission's filing of its transcript.* The mere filing of the transcript certainly did not vacate the judgment already entered and oust the Court of Appeals for the Second Circuit of jurisdiction to review the judgment on appeal.

The Second Circuit Courts did not purport to decide directly the validity of petitioner's license and of course were not called upon to do so. However they passed upon every objection which respondent made in the review proceeding to petitioner's taking its land. If respondent had been successful in the Second Circuit litigation it would have achieved precisely what it sought in the review proceeding. The Second Circuit Courts having had jurisdiction, respondent is bound by their determinations.

The court below was not thereby prevented from passing on the validity of the license pursuant to § 313(b), but in doing so should have recognized the binding effect of the Second Circuit judgment with respect to matters already litigated. *Embry* v. *Palmer*, 107 U. S. 3, 12-13; *George H. Lee Company* v. *Federal Trade Commission*, 113 F. 2d 583.

If the Court of Appeals for the Second Circuit had held that petitioner could not acquire respondent's land, the Commission although not a party would have been bound if for no other reason because it could not issue a license for the project under the 1957 Act except to petitioner. Even if the Commission had not been bound by the Second Circuit

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* As a matter of fact since the Commission in its January 30 and March 21 orders did not actually include any of respondent's land within the project area as licensed there is serious doubt that respondent was aggrieved by any order of the Commission prior to May 5. Even if the court below was correct in holding that the May 5 order related back to January 30 and that upon the making of the May 5 order the January 30 order aggrieved respondent (and the court therefore was able to review it) the fact remains that respondent under that theory was not aggrieved by the January 30 order when it brought the declaratory judgment action in April. If it was not then aggrieved bringing the declaratory judgment and injunction action was the only Federal remedy then available to it.

judgment, respondent would have been precluded from relitigating the same issues in a second forum. It would have gained nothing by finding a new opponent. *Bruszewski* v. *United States*, 181 F. 2d 419 (3rd Cir. 1950); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Coca Cola* v. *Pepsi-Cola Co.*, 6 W. W. Harr. (36 Del.) 124, 172 A. 260 (1934).

The presence of an additional party in the review proceedings did not put respondent in a position to relitigate issues already concluded in the Second Circuit. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U. S. 371; *Green* v. *Bogue*, 158 U. S. 478; *National Circle, Daughters of Isabella* v. *National Order of Daughters of Isabella*, 270 Fed. 723, *cert. den.* 255 U. S. 571; *Tauziede, et al.* v. *Jumel*, 133 N. Y. 614.

The facts here are precisely the opposite of those in *Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320. There after the Court of Appeals in a review proceeding had affirmed the Commission's order and in doing so held (against the contentions of the state which was a party to the proceeding) that specific state property could be taken for the project by the licensee through the exercise of the Federal power of eminent domain delegated to it by Congress under the Federal Power Act, a state court entered a judgment expressly contradicting the prior judgment of the Court of Appeals and in effect nullified the Commission's licensing order.

The doctrine of the *Tacoma* case that the court in which a license review proceeding is brought has upon *actual* review of the licensing order exclusive jurisdiction to decide "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms" thereby precluding "*de novo* litigation between the parties of all issues inhering in the controversy" should not be extended to the extent of permitting the court on review to decide *de novo* issues presented in

the review proceeding which were previously determined by a court of competent jurisdiction in an action brought by the same party which brought the review proceeding.

Neither should it be extended to the extent of holding that a licensee's right to condemn land for a power project can be contested only in a review proceeding. Such a holding would lead to absurd results.

Landowners are not personally notified of licensing proceedings which may affect their property. Section 4.31 of the Commission's Regulations provides in connection with license applications "that notices will be given in accordance with the requirement of § 4 of the Act." Sections 4(e) and 4(f) of the Federal Power Act require the Commission to publish notice of a license application in a newspaper published in the county or counties in which lands affected by the project are located. The notice is not required to describe specifically lands affected by the project. Of course, one reading the notice would have a right to look at the application and exhibits on file with the Commission. However, the Commission's rules merely require the application to include "a project area map with such information with respect to such lands affected as *is readily available without a detailed survey.*" (18 C. F. R. § 4.31). Under the rules the boundaries of the project are not finally determined until it is virtually completed (18 C. F. R. § 4.41(F)). In addition, land which is not included within the project area (and its use therefor not licensed by the Commission) often has to be condemned, *e.g.*, for spoil banks, relocation of railroads, highways, houses and other structures.

In any event, the chances of a property owner's obtaining actual notice that his land is to be affected from a legal notice are not good. Therefore, if the licensee's right to take land could be contested only in a licensing proceeding, the owner would often be precluded by a final determination

therein before he discovered that his land was to be taken for project purposes.*

In our case, as stated on p. 33, *supra*, it was an open and notorious fact that petitioner required Tuscarora land for the power project. It had actually been negotiating with the Tuscarora for a long time prior to the Commission's holding hearings on the license. The United States government refused to represent the Tuscarora in the license proceeding (E. R. 117) but the Nation nevertheless intervened and thus became eligible under § 313(b) to bring a review proceeding. If a review proceeding were held to be an exclusive method of testing a licensee's right to take land for a power project and if respondent had not intervened, the result would be completely unconscionable, for respondent would never have had its day in court.

POINT V

The final order and judgment of the court below is a usurpation of Congressional and administrative authority.

In its final order and judgment the court below approved the license "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." It then went on to direct the Commission to amend the license by adding to it an affirmative provision "to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes".

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*While no personal notice is required to be given property owners actual notice that an application has been filed is required to be given to states and "state commissions" affected and where public lands are involved to the Department of the Interior. (18 C. F. R. §§ 4.31, 4.37).

The court did not give any direction with respect to condemning their land for roads, transmission lines or other project purposes. As we have shown in the Statement, pp. 13-14, *supra*, 86.5 acres of land were vitally needed for transmission lines which have been constructed and are in operation.

The court approved a license including Tuscarora land even for reservoir purposes but denied petitioner's right to acquire use of that land for that purpose by condemnation. The result is that under the court's order petitioner has a duty to build a reservoir on Tuscarora land but as a practical matter since the Power Authority cannot purchase the land, it has been put in a position where it is unable to comply with the license.

The court had no power to direct the Commission to amend the license for the purpose of denying petitioner the power of condemnation of land included in the license. The power to condemn land needed for a licensed project is granted to a licensee by Congress through § 21 of the Power Act. It is not a power to be granted or denied by the Commission.

The court's order is a usurpation of administrative as well as congressional authority in that it ties the hands of the Commission to the extent that the Commission cannot take further steps which in its judgment may be necessary as a result of the court's holding that the licensee cannot condemn respondent's land. *Federal Power Commission v. Idaho Power Company*, 344 U. S. 17. In the *Idaho* case the Court of Appeals attempted to strike a provision from an order of the Commission and as thus modified, to affirm it. Here the court attempted to add a negative provision to the license and as thus modified, to approve it. The statute gives the Court power to affirm, modify or set aside the licensing order. It does not give the Commission the power

to make the administrative decision of approving the license. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930).

Conclusion

The judgment under review should be reversed and the court below directed to dismiss the petition for review or affirm the order of the Commission under review.

Respectfully submitted,

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October 16, 1959

APPENDIX A

The Niagara Redevelopment Act, Public Law 85-159, Act of August 21, 1957, 16 U. S. C. §§ 836, 836a, provides in pertinent part:

"§ 836. Authorization to license construction and operation; licensing conditions

"The Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

"(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

"(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

• • •

"(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission

project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: . . ."

"§ 836a. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized."

Sections 3(1) and 3(2) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 796 (1) (2)) provide as follows:

"SEC. 3. The words defined in this section shall have the following meanings for the purposes of this Act, to wit:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;"

Section 4(e) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 797(e)) provides as follows:

"SEC. 4. The Commission is hereby authorized and empowered—

. . . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto; except that this provision shall not apply to any Government dam con-

structed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Sections 10(a) and 10(e) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 803(a)(e)) provide as follows:

"Sec. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States, or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures

in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge, and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period."

Section 21 of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 814) provides as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of

interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." [41 Stat. 1074; 16 U. S. C. 814]

Section 177 of Title 25 of the United States Code (R. S. 2116) provides as follows:

"§ 177. *Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Section 233 of Title 25 of the United States Code (64 Stat. 845) provides as follows:

"§ 233. Jurisdiction of New York State courts in civil actions

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil

actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, that nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

APPENDIX B

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138) provided:

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of preemption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (emphasis added)

Section 8 of the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330) provided:

> "Sec. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treaty with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

No. 96

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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NOVEMBER 30, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the express consent of Congress necessary to overcome the specific statutory prohibitions in 25 U.S.C. §§ 177 and 233 against the alienation of Indian tribal lands and the specific protections in

16 U.S.C. § 797(e), against the indiscriminate licensing of Indian tribal lands can be found in Public Law 85-159, 71 Stat. 401, a general statute which, without describing the location or character of the project facilities, merely authorizes the construction of a power project and does not mention either Indians or their property.

2. Whether the Tuscarora Reservation is to be excluded from the statutory term "tribal lands embraced within Indian reservations," and thus is to be denied the benefits of an uncontested finding by the Commission under the first proviso in Section 4(e) of the Federal Power Act, solely because the Tuscarora Nation holds fee title to its tribal lands, even though the United States retains the power to control the alienation of those lands and maintains a guardianship relation to the Nation.

3. Whether the Court of Appeals, in the exercise of its "exclusive jurisdiction to affirm, modify or set aside" an order of the Commission under Section 313(b) of the Federal Power Act: (a) violated some principle of res judicata by passing upon the validity of the Commission's license order in this case because of a prior decision by the Court of Appeals for the Second Circuit in a related case where the Commission was not a party and the validity of the license was not litigated; or (b) exceeded judicial power, after being advised by the Commission that the required Section 4(e) finding could not be made with respect to the Tuscarora Reservation, by directing the Commission to exclude respondent's lands from the scope of the license instead of merely remanding the case to the Commission for further proceedings.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A to the Brief filed by the Power Authority of the State of New York, petitioner in No. 66,* at pp. 1a-7a, inclusive.

STATEMENT

1. *Origin of the Tuscarora Reservation.* Respondent, the Tuscarora Indian Nation, is a recognized tribe of American Indians which owns and occupies a reservation of 6,249 acres in Niagara County, New York. Originally resident of North Carolina, the Tuscarora Indians in the early Eighteenth Century were driven from their ancestral homes by white colonists and fled to New York, where they were adopted as the sixth nation of the famed Iroquois Confederacy. Although the bulk of the Tuscaroras initially settled in the central portion of the latter State, historical records further show that these Indians by 1780 already had begun to live on the site of their present reservation. R. Ex. 220-22.**

On October 22, 1784, at least four years after respondent's members first planted roots in Western New York, the United States entered into a Treaty with the Six Nations, 7 Stat. 15, Article II of which declared:

> "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

* The brief of the petitioner in No. 66 is cited hereinafter as "PA Brief, ..."; the brief of the petitioner in No. 63, the Federal Power Commission, is cited as "FPC Brief, ..."

** The transcript of record consists of two volumes: the first volume, containing 334 pages of testimony, opinions and other proceedings, is cited hereinafter as "R. ....."; the second volume, containing 243 pages of exhibits, is cited as "R. Ex. ....."

This promise of protection by the Federal Government was reaffirmed in Article 3 of the Treaty of January 9, 1789, 7 Stat. 33, which, however, remained unratified. In the Treaty with the Six Nations of November 11, 1794, 7 Stat. 44, popularly known as the Treaty of Canandaigua, the United States again solemnly agreed not to disturb the Indians, including the Tuscarora Nation,[1] in the "free use and enjoyment" of their lands, which "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

Less than three years later, on September 15, 1797, the Seneca Nation, with the consent of the United States, entered into an agreement (R. 311-15) with Robert Morris, acting on behalf of the Holland Land Company, for the sale of a large territory in Western New York, including the property being used and occupied by respondent. The Tuscarora Nation was not a party to this agreement, and is described in contemporaneous documents as having then been "forgotten." R. Ex. 165. The record discloses, though, that, following the 1797 Treaty, Robert Morris deemed respondent's claim to the lands upon which it was settled to be "so just" that he "granted to those Tuscaroras the use and occupancy" of one square mile, subject to a continuing pre-emptive right in favor of the Holland Land Company. R. Ex. 165. The Indians,

[1] Under Articles II and III of the Treaty of Canandaigua, the Federal Government guaranteed certain lands to the Six Nations and "their Indian friends residing thereon and united with them." The fact that these stipulations covered the Tuscarora Nation is evidenced by the signature on the Treaty of "Kanatsoyh, alias Nicholas Kusik", identified as a Tuscarora under the name "Kanatjogh, or Nicholas Cusick" in the Treaty of December 2, 1794, 7 Stat. 47, and under the name "Kanat-soyh, or Nicholas Cusick" in the Treaty of January 15, 1838, 7 Stat. 550.

expressing the view that the tract so granted was insufficient for their needs and did not include the whole of their houses and farms, requested that an additional area of land be set aside for their reservation. R. Ex. 166, 168-70. Shortly thereafter, the Holland Land Company authorized and directed its agent "to lay off two square miles of land to include the Tuscarora Village, which land should be granted to the Indians for their sole use and benefit as long as they should think proper to reside thereon." R. Ex. 167. This tract and a grant of an additional 640 acres from the Seneca Nation (R. Ex. 201-2) form the nucleus of the present Tuscarora Reservation.

Beginning in 1801, the Tuscarora Indians also commenced dealings with the United States looking towards the sale of lands belonging to the Nation in North Carolina and the purchase of additional lands adjacent to their residence in New York.[2] R. Ex. 171-79, 223-33. For a period of several years, officials of the Federal Government in fact did carry on extensive and delicate negotiations for the purchase and sale of land on behalf of the Tuscarora Nation. R. Ex. 181-85. Finally, on November 28, 1804, Secretary of War Dearborn advised the United States Indian-

[2] In the words of Longhard, one of the Tuscarora chiefs, addressed to the Secretary of War (R. Ex. 178):

> "The Tuscarora's wish from the avails of the land sold in North Carolina to purchase about five miles square of the Holland Company, joining to, and running parallel with the lands now possessed and occupied by the Tuscarora Nation."

To this request the Secretary replied (R. Ex. 179):

> "I will receive the money which may be transmitted by your agent in North Carolina, and have it safely lodged in the Bank, where it will rest until it can be applied to the object contemplated by you."

Agent having jurisdiction over respondent (R. Ex. 188):

> "The bargain has been closed with Mr. Busti Agent for the Holland Company for the lands you agreed for on the part of the Tuskarora Indians and I have received a Deed of the same by which I am to hold the lands in trust for said Nation, and have made the first payment therefor with the money which had been rec'd for their lands in North Carolina—You will therefore inform the Chiefs they may take possession of and occupy said lands as those of their Nation."

Both the court below (R. 429) and the Court of Appeals for the Second Circuit (*Tuscarora Nation of Indians v. Power Authority*, 257 F. 2d 885, 887) correctly recognized the vital role which the United States thus played in acquiring an additional 4329 acres for inclusion within the Tuscarora Reservation.

This last tract, to which the Nation received a deed in 1809,[3] includes all of the lands involved in this case.

[3] The fact that respondent was given a deed to this area by the Secretary of War is, of course, primarily a matter of historical accident. During the early part of the Nineteenth Century, the treaties between Indian tribes and the United States generally provided, apart from mutual promises of peace and friendship, for land cessions by the Indians and their removal to the West. Cohen, *Handbook of Federal Indian Law* (U.S.G.O., 4th Ed., 1945), at pp. 48-62. Only at a later date did more formal trust language become standard in defining the tribal estate, with the Federal Government holding bare legal title and the Indians possessing a complete beneficial interest. These distinctions, however, always have been treated as matters of form rather than substance—a truism illustrated in respondent's case by the Treaty of January 15, 1838, 7 Stat. 550, 554, under which the Tuscarora Nation conveyed most of its land to the United States and, with the approval of the United States, conveyed the remainder to third parties. Although the latter conveyance subsequently was annulled and

2. *History of this Litigation*—In 1950, the United States and Canada entered into a treaty establishing the amount of water each nation might divert from the Niagara River for power purposes. 1 U.S.T. 694. Thereafter followed seven years of Congressional hearings and vigorously contested litigation to decide how that power should be developed. FPC Brief, pp. 7-8, fn. 5 and 6. The advocates of public and private power each possessed sufficient weight to block the other group from moving forward, but neither side possessed sufficient strength to push through to ultimate victory.

In 1957, a compromise satisfactory to all parties finally was achieved. By Section 1(a) of the Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, Congress directed the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Then in Section 1(b) of the statute, Congress further directed the Commission to impose certain express conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act." The seven conditions so specified by Congress constituted the concessions to private power companies, neighboring States and other economic and

other provisions of the agreement were not carried out. Article 14 of the 1838 Treaty, which recited that the Tuscaroras were conveying the property which they owned in fee to the United States "in order to have the same done in a legal and proper way," clearly reflected an understanding by the parties that the Federal Government still retained a paramount interest in and authority over the disposition of such Indian tribal lands. 7 Stat. 554; cf. *The New York Indians*, 5 Wall. (U.S.) 761 (1867).

political interests so essential to passage of the legislation.

In the Act of August 21, 1957, therefore, Congress determined as a matter of policy how the waters of the Niagara River were to be utilized. Congress, however, did not designate the location of the power project, describe the nature of the project works or otherwise approve any particular engineering plan for power development—all technical matters within the special competence of the Commission and thus referred for decision by it under the provisions of the Federal Power Act. Moreover, Congress in Public Law 85-159 did not refer to the Tuscarora Indian Nation or the Tuscarora Reservation. Indeed, the legislative history of this 1957 statute is devoid of the slightest indication that Congress or any of its committees knew or even suspected that Indian land ultimately might be desired in construction of the Niagara Project.

On January 30, 1958, after hearings, the Federal Power Commission issued a license to the Power Authority of the State of New York "under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401)" for construction of the Niagara Project. R. 404. Petitioner's license was issued over the protest of respondent, the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its reservation for a water storage reservoir. Respondent's objection to this project facility was based in part upon the licensee's lack of legal authority to acquire Indian lands without the express consent of Congress. The Commission declined to pass upon that question on the ground that "other

lands are available for reservoir use if the Applicant [Power Authority] is unable to acquire the Indian lands, although alternative lands may be more expensive." R. 395.

In denying the Tuscarora Nation's petition for rehearing, the Commission on March 21, 1958, again refused to decide whether the Power Authority lawfully could acquire Indian lands, ruling that this issue was "a question to be resolved by a court of competent jurisdiction." R. 413. The Commission further held that respondent's property was not part of a "reservation" within the meaning of Section 4(e) of the Federal Power Act, and hence need not be made the subject of a finding by the Commission as to whether the license would "interfere or be inconsistent with the purpose for which such reservation was created or acquired." *Ibid.*

On May 16, 1958, less than 60 days after the denial of the rehearing application, respondent filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia court thereby acquired "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part." *Ibid.*

In the meantime, on March 21, 1958, the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300.35 acres of land belonging to the Tuscarora Nation for use in the Niagara Project. On April 15, 1958, however, the Power Authority wholly abandoned this judicial proceeding and, purportedly acting pur-

suant to a newly-adopted State law, attempted to appropriate over 1383 acres[4] within the Tuscarora Reservation by the mere filing of a map in the office of the State Superintendent of Public Works.

Faced with an imminent appropriation of its property under State law before the District of Columbia court could determine the validity of the basic license, respondent filed a complaint in the United States District Court for the Southern District of New York on April 18, 1958, seeking, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands belonging to the respondent without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation, condemnation or otherwise lands belonging to the respondent in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain exceptions, was granted by the court. The case then was transferred to the United States District Court

[4] The increase of 83 acres in the amount of territory within the Tuscarora Reservation which the Power Authority sought to acquire did not come about through an engineering decision, but rather resulted from a decision on legal tactics—the desire to have project facilities located only on the tract purchased by the United States for respondent in 1804 and not, as the reservoir plans originally were drawn, in part also on the two other tracts which the Indians possessed before that date. Moreover, the fact that the area of Tuscarora land demanded by the Power Authority repeatedly changed prior to April 15, 1958, demonstrates that petitioner's own concept of the Niagara Project did not become final until almost a year after Congress had acted.

for the Western District of New York.[5] *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 407 (W.D. N.Y., 1958). Immediately thereafter, respondent prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision.

On July 24, 1958, the Court of Appeals for the Second Circuit reversed the judgment below insofar as the District Court had dismissed the complaint and thereby had blocked the Tuscarora Nation from any relief by way of a declaration of rights. Specifically, the Court of Appeals held that the United States, by vir-

[5] The Government points out that, while these proceedings were pending, the Power Authority and the Indians were engaged in negotiations looking towards a possible settlement, and that petitioner made an offer to respondent which "has never been withdrawn." FPC Brief, pp. 15-16. What the Government unfortunately fails to point out is that the Power Authority's "offer" was and still is an empty gesture since, as the court below and the Court of Appeals for the Second Circuit both ruled (R. 423-24), the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U.S.C. §§ 177, 233. What actually happened is that the parties eventually reached agreement on virtually all economic issues, and then petitioner broke off all further negotiations by adamantly insisting upon an impossible and illegal demand, i.e., that "we cannot and will not make a settlement contingent upon the passage of Federal legislation." Letter of Chairman Robert Moses of the New York Power Authority to counsel for respondent, dated January 23, 1959.

tue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in the State of New York, although, of course, these protective statutes were subordinate to a proper exercise of the Federal Government's own right of eminent domain. Since the appropriation proceedings instituted by the Power Authority under New York law did not stem from or otherwise involve the exercise of any Federal condemnation power, these proceedings were vacated and annulled.[6] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958).

The Court of Appeals for the Second Circuit further ruled, however, that, if the Commission license were valid—an issue which concededly was still pending before the District of Columbia court—then the Power Authority could exercise a Federal right of eminent domain with respect to the Tuscarora Reservation through regular condemnation proceedings. In support of this conclusion, the court cited not only Section 21 of the Federal Power Act, 16 U.S.C. § 814, but also Public Law 85-159, 71 Stat. 401, the 1957 act directing the issuance of a license to the Power Authority for the Niagara Project. As to the latter statute, the court said that Congressional permission for the taking

[6] This aspect of the Court of Appeals ruling, dealing with the inapplicability of the State appropriation procedure, is the subject of an appeal still pending in this Court filed by the New York Superintendent of Public Works, *McMorran* v. *Tuscarora Nation of Indians*, No. 4, Oct. Term, 1959. On July 27, 1958, however, the Power Authority abandoned the State appropriation procedure and instituted a condemnation suit in the United States District Court for the Western District of New York, *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D.N.Y.). In view of this action, respondent herein has filed a suggestion of mootness in No. 4.

of respondent's land could be found by inference from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation." 257 F. 2d at 893.

On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the judgment of the Court of Appeals for the Second Circuit, with one exception not here relevant, conditioned upon the filing of a petition for a writ of certiorari by the Tuscarora Nation on or before September 19, 1958. *Tuscarora Nation of Indians* v. *Power Authority*, 79 Sup. Ct. 4 (1958). Respondent duly filed such a petition, requesting interim relief from the impact of the Second Circuit decision until the District of Columbia court could determine the validity of the license and asserting that the Second Circuit decision raised a novel and important question as to the extent to which a general statute which does not mention an Indian tribe or its lands can be said to express a Congressional intent to lift specific Federal protections against the alienation of such lands. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, No. 384, Oct. Term, 1958. This petition for a writ of certiorari was denied on October 13, 1958. 358 U.S. 841. A motion for leave to file a conditional petition for rehearing out of time was denied on June 22, 1959. 360 U.S. 923.

On November 14, 1958, the Court of Appeals for the District of Columbia Circuit, after an expedited hearing, issued a memorandum opinion which subsequently ripened into the decision about which petitioners here complain. *Tuscarora Indian Nation* v. *Federal Power Commission*, 265 F. 2d 338 (C.A.D.C., 1958). The court

there held: (a) that the United States, by virtue of 25 U.S.C. §§ 177 and 233, controls the alienation of lands within the Tuscarora Reservation, and that these lands cannot be taken by the Power Authority for reservoir purposes without the consent of the United States; (b) that such consent is not to be found in the 1957 statute authorizing the issuance of a license to the Power Authority, Public Law 85-159, 71 Stat. 401; (c) that the 1957 statute obliged the Commission in licensing the Power Authority to adhere to all conditions required by the Federal Power Act, including the proviso in Section 4(e) that projects may be located within Indian reservations "only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired"; and (d) that the Commission thus could not issue a license for the construction of a reservoir on Tuscarora lands unless it made the finding required by this proviso in Section 4(e). Accordingly, the case was remanded to the Commission "that it may explore the possibility of making that finding" and the court retained jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to the limited remand. R. 431-32. The Commission was given fifteen days during which to respond. R. 432.

On November 17, 1958, the Commission issued a Notice of Further Hearing "upon the questions presented and for the purposes set forth in Section VII" of the November 14 opinion of the Court of Appeals, i.e., solely on the possibility of making the required Section 4(e) finding. 23 *Fed. Reg.* 9101. That hearing commenced on November 24, but became so protracted and covered such a host of issues beyond what was

specified in Section VII of the court opinion, and in the Notice, that the Commission was forced to obtain numerous extensions of time during which to report its action back to the Court of Appeals.

Finally, on February 2, 1959, the Commission, after consideration of the exhaustive record, the detailed written briefs and the lengthy oral argument, determined that "the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." R. 489. In other words, the Commission concluded that the finding which the Court of Appeals had found essential as a condition precedent to a valid grant of a license on Indian lands could not be made. On February 25, the Commission denied the Power Authority's application for a rehearing of this decision. R. 506-510. The Commission's holding that a Section 4(e) finding could not be made in this case never has been appealed and, therefore, is final and not before this Court.

On March 24, 1959, the Court of Appeals denied all motions for reconsideration of its memorandum opinion of November 14, 1958, and entered a final order approving the license issued to the Power Authority for the Niagara Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." R. 533. The Court further ordered "that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." *Ibid.* The instant petitions for certiorari were prosecuted from this order of the court below.

In the meantime, on March 2, 1959, the Power Authority filed with the Commission an application for an amended license which requests permission to construct a storage reservoir wholly outside the Tuscarora Reservation. In that application the Power Authority states that it "cannot afford to await the outcome of further litigation, but must proceed with an amendment to the license and construction of the reservoir [off Tuscarora land] without further delay." The Commission gave official notice of a hearing on this application under date of March 3, 1959, asserting that the "matter is one that should be disposed of as promptly as possible. . . ." 24 *Fed. Reg.* 1711. Nearly nine months have passed and nothing further has happened.

SUMMARY OF ARGUMENT

I

A. The United States possesses a paramount power to control the lands owned and occupied by Indian tribes. Over the years, the Government also has assumed a special protective relationship towards Indians, known generally as guardianship. As an incident of guardianship, and in the exercise of supreme Federal authority, Congress has prohibited the alienation or other disposition of Indian tribal lands without the consent of the United States. R.S. 2116, 25 U.S.C. § 177. This Federal statutory restraint upon alienation applies equally to lands held in trust by the United States and to lands, such as the Tuscarora Reservation, owned in fee by the Indians, and, by virtue of 25 U.S.C. § 233, clearly is also applicable to Indian reservations in the State of New York. The restraint on alienation, coupled with the powers of the United

States as guardian, further creates a Federal interest in all Indian tribal lands.

B. As a necessary corollary of overriding Federal authority and Federal protections is the principle of law that lands belonging to Indian tribes, including respondent's property, may not be taken or otherwise appropriated except to the extent that Congress explicitly consents. The basic rule, as announced by this Court, is that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884). The safeguards over and resultant interest in the Tuscarora Reservation which Congress has established by legislation reflect a beneficial national policy and may not be overcome or eliminated in the absence of the clearest and most unequivocal legislative intent.

C. Relevant canons of statutory construction invoked by this Court in cases involving tribal property augment the necessity for express Congressional consent to the condemnation of lands within the Tuscarora Reservation. Fundamental is the rule that laws affecting Indians must be liberally construed for their benefit and protection. *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912). "Doubtful expressions must be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). And, more generally, statutory grants which operate to relinquish a public interest must be strictly construed, with nothing passing by mere implication. *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892).

II

The express Congressional consent necessary to the taking of Tuscarora lands cannot be found in, or implied from, the Niagara Development Act of 1957 (Public Law 85-159), a general statute which mentions neither respondent nor its reservation.

A. In Section 1(a) of the 1957 Act, Congress implemented a 1950 Treaty with Canada (1 U.S.T. 694) by directing the Federal Power Commission to issue a license to the New York Power Authority for construction of the Niagara Power Project. In Section 1(b) of the Act, Congress further directed the Commission to impose seven conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act"—the conditions so specified being the concessions to private power companies, neighboring States, and other economic and political interests considered essential to passage of the legislation. With respect to all other features of the Niagara Project, including technical matters, however, Congress directed the Commission to issue the license pursuant to the terms of the Federal Power Act. S. Rep. No. 539, 85th Cong., 1st Sess. (1957), p. 1. Congress in Public Law 85-159, therefore, did not exercise the totality of its authority with respect to development of the Niagara River and did not supersede the Federal Power Act to the extent of specifying project facilities in any particular form. Accordingly, a taking of Tuscarora lands by necessary implication cannot be found.

B. Moreover, even if Public Law 85-159 did supersede Section 4(e) of the Federal Power Act, Congress in the 1957 statute still did not expressly authorize or

otherwise consent to the taking of respondent's lands for power project purposes." Not the slightest reference to or mention of the Tuscarora Indian Nation or the Tuscarora Reservation appears at any place on the face of the statute. In addition, the legislative history of the 1957 Act is wholly silent with respect to respondent and thus conclusively demonstrates that Congress could not possibly have possessed an awareness or knowledge that part of the Tuscarora Reservation might be desired for the Niagara Project. To find the requisite express Congressional consent to the taking of respondent's tribal property under such circumstances would violate the plain words of the statute as well as every relevant canon of statutory construction.

C. As heretofore noted, the rule of law is clear that the necessary legislative authority for the alienation of Tuscarora lands cannot be found by implication from the nature or scope of the Niagara Project. Even if a finding of "consent by implication" were permissible, however, such a conclusion cannot properly be drawn on the facts of this case. Specifically, at the time Public Law 85-159 was enacted, respondent's property was not essential in the construction of the Niagara Project to maximum planned capacity; indeed, as of January 30, 1958, the Commission declared that "other lands are available for reservoir use if the Applicant [Power Authority] is unable to acquire th Indian land[s] . . . ." R. 395. Furthermore, the record does not disclose any basis for imputing to Congress the knowledge or even a suspicion that a portion of the Tuscarora Reservation might be desired for a storage reservoir. In the absence of a necessity to use Tuscarora lands and in the absence of Congressional

knowledge that such lands might be used for the Niagara Project, "consent by implication" to the condemnation of respondent's reservation may not be found.

III

The requisite Congressional consent to the alienation of Indian tribal lands may be found in this case, if at all, only in the provisions of the Federal Power Act, 16 U.S.C. §791a *et seq.* To the extent that the Tuscarora Nation loses under that Act the protections of 25 U.S.C. §§ 177 and 233, of course, respondent automatically becomes entitled to the protections over Indian tribal lands provided by the Federal Power Act. The Tuscarora Reservation thus may not be licensed by the Federal Power Commission for use in the Niagara Project in the absence of the finding required under Section 4(e), 16 U.S.C. §797(e).

A. Respondent's lands are tribal lands within an Indian reservation subject to the supervision of the Secretary of the Interior. Indeed, the fact that the Tuscarora Reservation is an Indian reservation is not disputed. Since respondent's lands originally were granted to the Nation and the Nation is prohibited from disposing of its property without the consent of the United States, which consent never has been given, the Tuscarora Reservation as a matter of law and fact must consist of tribal lands. Finally, the Federal Government has exercised supervision over the Tuscarora Reservation, and only Congress, not the courts, may determine when that special relationship shall cease. *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921).

B. Given the fact that respondent's lands are tribal lands within an Indian reservation subject to the

supervision of the Secretary of the Interior, the Tuscarora Reservation by definition is a "reservation" within the meaning of Sections 3(2) and 4(e) of the Federal Power Act. The fact that respondent's lands are held in fee by the Nation is immaterial, since Federal protections apply equally to all lands of tribes recognized by the United States, whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417 (C.A. 4, 1938).

Specifically: (1) the plain language of the Federal Power Act precludes any distinction between tribal lands owned in fee by the Indians and tribal lands held in trust by the Federal Government; (2) the legislative background and legal environment in which the Federal Power Act is set, including administrative interpretations of related laws, militate against a conclusion that the statutory definition of reservations is limited to Indian tribal lands in which the United States has a proprietary interest; (3) the United States has a sufficient interest in the Tuscarora Reservation (*Heckman* v. *United States*, 224 U.S. 413, 444-46 (1912)) to bring respondent's lands within the scope of the term "interests in lands" used in Section 3(2); (4) restricting the term "reservations" to tribal lands which the Federal Government may dispose of under the Property Clause of the Constitution would exclude the bulk of all Indian reservations in the United States from the protections of the Federal Power Act (*Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *United States* v. *Creek Nation*, 295

U.S. 103, 109-10 (1935)); and (5) to deprive the Tuscarora Nation of the benefits of Section 4(e) would be contrary to well-settled Government policies to safeguard Indian tribes in the use and enjoyment of their lands.

C. Since Tuscarora lands constitute tribal lands embraced within an Indian reservation as defined in Section 3(2) of the Federal Power Act, respondent is entitled to the benefit of the uncontested finding by the Commission under Section 4(e) that the Niagara Project will be inconsistent with the purposes for which the Tuscarora Reservation originally was established.

IV

The Court of Appeals properly directed the Commission to exclude Tuscarora lands from the scope of the license issued to the Power Authority. In the first place, the court below was not precluded from deciding the validity of the Commission's license order by any decision of the Court of Appeals for the Second Circuit. 16 U.S.C. §§ 825*l*(b); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958). Secondly, having correctly decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below did not invade an administrative function by ordering that the license be amended so as to eliminate all impact upon the reservation.

ARGUMENT

I. THE TUSCARORA RESERVATION IS SUBJECT TO FEDERAL PROHIBITIONS AGAINST THE ALIENATION OF INDIAN LANDS AND MAY NOT BE TAKEN OR OTHERWISE ACQUIRED FROM RESPONDENT WITHOUT THE EXPRESS CONSENT OF CONGRESS.

Basic to an understanding and resolution of the issues in this case is an awareness that the United States possesses paramount power to control the disposition of Indian lands and has exercised that supreme authority to place the Tuscarora Reservation under a general restraint on alienation. The doctrine of paramount Federal power and its particular application to respondent's fee lands—both of which are conceded by the Solicitor General before this Court[7]—penetrate and color every major question of statutory interpretation here under consideration. For as a necessary corollary of this overriding Federal authority and resultant Federal protection is the principle of law that lands belonging to Indian tribes, including the Tuscarora Reservation, may not be appropriated or otherwise invaded unless Congress *expressly* consents.

A. The United States Possesses Paramount Power to Control the Disposition of Indian Lands and Has Exercised That Authority to Restrict the Alienation of Respondent's Tribal Property.

From the earliest days of our Nation, the Congress of the United States always has retained the power to govern and control the territory reserved and held by Indian tribes for their permanent use and occu-

[7] In the words of the Government Brief at pp. 55-6, tribal fee lands within the Tuscarora Reservation "are protected by the statutes prohibiting alienation of Indian lands without federal approval . . ."

pancy. The several States, including the State of New York, have no express power over Indian affairs comparable to the authority delegated to Congress under the Constitution.[8] Accordingly, wherever a conflict over jurisdiction has arisen, this Court consistently has ruled that the Federal Government, and not the States within which such tracts may be located, has the basic and thus superior right to legislate for the regulation and protection of Indian reservations. *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Creek County* v. *Seber*, 318 U.S. 705 (1943); *Williams* v. *Lee*, 358 U.S. 217 (1959). And with specific reference to the disposition of real property, the Court as long ago as 1823 held that Indian lands may be sold only to the United States or with the consent of the United States. *Johnson* v. *McIntosh*, 8 Wheat. (U.S.) 543 (1823).

The doctrine of Federal supremacy with respect to Indian lands has evolved through the years into the

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[8] E.g., Article I, Section 8, authorizing Congress to regulate commerce with the Indian tribes, and Article II, Section 2, authorizing the President, by and with the advice and consent of the Senate, to make treaties. See *Martin* v. *Hunter's Lessee*, 1 Wheat. (U.S.) 97 (1816), in which the Court declared at p. 102:

> "There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation . . . ."

modern concept that the Federal Government occupies a special position as the guardian of Indian tribes throughout the Nation. Thus, in describing this fiduciary relationship, the Court said in *United States* v. *Kagama*, 118 U.S. 375 at 383-4 (1886):

> "* * * These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court whenever the question has arisen.

See also *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926).

The protective relationship of the United States to Indian tribes is epitomized in the adoption of Federal legislation to prevent the improvident disposition of tribal property. R.S. 2116, 25 U.S.C. § 177. In pertinent part, the statute provides:

> "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * * The agent of any State who may be present at any treaty held with Indians, under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians compensation to be made for their

claim to lands within such State, which shall be extinguished by treaty.'"[9]

This provision, in other words, dictates that no disposition of Indian tribal lands may be valid in law or equity without express Congressional approval.

The application of 25 U.S.C. §177 to tribal lands owned in fee cannot now be questioned. Federal protections, the courts uniformly have ruled, shield all lands of tribes recognized by the United States, whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 320 (1927); *United States* v. *Candelaria*, 271 U.S. 432, 441-43 (1926); *United States* v. *Sandoval*, 231 U.S. 28, 48 (1913);[10] *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417 (C.A. 4, 1938); Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), p. 321; 18 Ops. Att'y Gen. 235 (1885). The whole thrust of 25 U.S.C. § 177 is to protect tribal possession of lands, a very real and continuing Federal interest which in no way is dependent upon whether the technical fee is in the United States or in the Indians.

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[9] This statute is not rendered obsolete by the fact that since 1871 the practice of making treaties with Indians has been abolished. 25 U.S.C. § 71. The change was only one of method. After that date many agreements or conventions have been made with Indian tribes, the difference being that now such contracts are approved by both Houses of Congress rather than by the Senate alone. Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th ed., 1945), pp. 66-67.

[10] In seeking to distinguish the cases cited in the text, the Power Authority relies heavily upon *United States* v. *Joseph*, 94 U.S. 614 (1876). SPA Brief, p. 56. Although the decision was not overruled in so many words, the rationale of the *Joseph* case was repudiated by this Court in the *Sandoval* case. 231 U.S. at 48-9.

Similarly beyond doubt is the applicability of 25 U.S.C. § 177 to the State of New York and, more particularly, to the Tuscarora Reservation. In 1950, when providing for the transfer of civil jurisdiction over Indian reservations from the United States to the State of New York, Congress made plain (Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. § 233):

> "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York. . . ."

The legislative history of the 1950 Act clearly demonstrates that Congress there intended to preserve Federal control over the sale or other disposition of Indian lands in the State. Specifically, the Report of the House Committee on Public Lands on S. 192 (H. Rep. No. 2270, 81st Cong., 2d Sess.), which eventually became 25 U.S.C. § 233, declared:

> "This bill provides that the Indians in the State of New York shall be subject to the civil laws of the State with the following exceptions:
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> * * *
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> "(4) That nothing contained in the act shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York."[11]

Of even greater significance in this case is the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York,

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[11] Comparable language appears in S. Rep. No. 1836, 81st Cong., 2d Sess. (1950), on the same bill.

which is printed in the *Congressional Record* for June 16, 1950, the day when S. 192 passed the Senate. This Report, which thus was available to all members of Congress, reads in part as follows (96 CONG. REC. 8738-39):

> "Since 1942, however, reservation Indians have been clothed with a degree of immunity from State law by reason of the decision in *United States* v. *Forness* (125 Fed. 2d 928, cert. den. 316 U.S. 694) which appiled [sic] the principle first declared in Worcester v. Georgia (6 Pet. 515 (1832)), holding that State laws do not apply to reservation Indians except insofar as the Federal Government has given its consent.
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> * * *
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> "The only significant changes to be expected from passage of the bills would be the positive ones of extending orderly processes of government to the reservations and of ending the power of individual Indians to avoid ordinary civil responsibilities. Passage of the bills would not effect any change in basic Indian traditions or customs unless these people, by means provided in the law, see fit to modify them. Enactment would, in fact, strengthen enforcement of such rules as do exist by banishing uncertainty as to the powers of State courts. *Neither would the proposed law permit taxation or alienation of reservation land*, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
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> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship. . . ." (Emphasis supplied.)

This quotation illustrates the fact that State officials, as well as members of Congress, recognized that New York did not then possess, and after passage of the

1950 Act still does not possess, the power to acquire Indian lands without express permission from the United States. Indeed, this very conclusion has just been reached, following a detailed study of the law, by another special committee of the New York Legislature. *N.Y. Special Legislative Committee on the Revision and Simplification of the Constitution*, Leg. Doc. (1958) No. 57, Ch. V, pp. 33-42 (reproduced in part at R. 377-80).

The view that 25 U.S.C. §§ 177 and 233 have current application to the Tuscarora Reservation, thereby preserving Federal control over the alienation of repondent's tribal lands, is the consistent conclusion reached by all courts faced with the question. Thus the Court of Appeals for the Second Circuit, in litigation related to this case, after thoroughly reviewing the foregoing statutes and relevant judicial decisions, decided that tribal lands within the Tuscarora Reservation could not be acquired by the Power Authority of the State of New York for reservoir purposes without the consent of the United States. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958). In so holding, the court recognized that prior to 1950 (257 F. 2d at 889):

> "... the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them."

As to the situation subsequent to 1950, when 25 U.S.C. § 233 became law, the Court of Appeals concluded (257 F. 2d 891):

> "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests in New York in Title 25 U.S.C.A. Sec. 233, pointed up and reaffirmed its paramount authority over Indian fribal lands."[12]

So, also, the court below acknowledged that 25 U.S.C. §§ 177 and 233 operate to require the consent of the United States before any alienation of Tuscarora land can be permitted, whether by way of condemnation or otherwise. The court held (265 F. 2d 338 at 339):

> "The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. [Citing and quoting 25 U.S.C. § 177 and § 233] . . . The United States Court of Appeals held that the lands involved here are protected by that provision. . . . To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner."

Finally, the consistent viewpoint of the Federal Departments and of recent legal commentators has been a recognition and acceptance of the applicability of 25 U.S.C. §§ 177 and 233 to Indian tribal lands in New

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[12] The Power Authority's quarrel (Brief, pp. 62-4, 82-4) with this conclusion of the Court of Appeals for the Second Circuit sharply contrasts with its insistence (Brief, pp. 87-95) that, in regard to the validity of the Commission's license order, an issue upon which the Second Circuit did not pass, its decision in res judicata.

York and, in particular, to the Tuscarora Reservation.[13] Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem in Federal-State Relations*, 8 BUFFALO L. REV. 1 (1958); see Point III, pp. 59-61, *infra*.

Thus, there is no responsible dissent from the proposition that the United States through 25 U.S.C. §§ 177 and 233 possesses and has exercised paramount control over the alienation of all or any part of the Tuscarora Reservation. That control or power, which evidences a vital Federal interest in respondent's lands, is the single most important fact in this case and is the critical starting point in resolving the legal issues here presented.

B. Tribal Lands, Including Respondent's Reservation, Subject to Federal Restrictions on Alienation, May Not be Condemned or Otherwise Acquired in the Absence of Explicit Congressional Consent.

From paramount Federal control over Indian reservations, and the parallel Federal relationship as guardian of Indian tribes, arises the principle that the power of eminent domain may be invoked on Indian tribal lands, including respondent's property, only with

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[13] See footnote 7, *supra*. In an opinion dated May 4, 1900, Assistant Attorney General Willis Van Devanter, later an Associate Justice of this Court, ruled that 25 U.S.C. § 177 barred the Secretary of the Interior from approving a lease on the Tuscarora Reservation without authority from Congress. R. Ex. 234-38. As recently as July 9, 1958, Elmer F. Bennett, then Solicitor and now Undersecretary of the Interior Department, expressed the view that 25 U.S.C. § 233 preserved the "applicability of R.S. Sec. 2116, 25 U.S.C. 177 to Indian tribal lands in New York." R. Ex. 242.

explicit Congressional consent.[14] Stated in other words, the protections over and resultant interest in the Tuscarora Reservation which Congress has established by legislation can be eliminated or overcome solely by the express will of that body. The obvious and historic national concern for safeguarding Indian landholdings, as evidenced by Federal legal prohibitions against the alienation of tribal property, militates against the use of any but the most plain and unequivocal statutory language before condemnation of a reservation may be considered validly authorized.

Repeated court decisions illuminate the necessity for express Congressional consent to the taking of Indian tribal lands and the impropriety of seeking that consent in doubtful terms or in questionable deductions. In *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884), this Court established the basic proposition that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[15] This doctrine has been followed in such cases

[14] Respondent does not question that the United States has a sovereign right to sanction the condemnation of Indian tribal lands. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890). The issue in this case is whether and, if so, to what extent that undoubted right has been exercised.

[15] In the *Elk* case, an Indian sought damages from a voting registrar in Omaha for refusing to register him as a qualified voter. Under the law of Nebraska, the plaintiff was entitled to registration if he were a citizen of the United States, a status which he claimed under the Fourteenth Amendment's reference to all persons born in the United States as being citizens of the United States. This Court affirmed the judgment against the Indian plaintiff on the ground that Indians are alien dependents who "were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect." 112 U.S. at 100.

as *McCandless* v. *United States*, 25 F. 2d 71 (C.A. 3, 1928), involving the Federal immigration laws, and *Chouteau* v. *Commissioner of Internal Revenue*, 38 F. 2d 976, 977 (C.A. 10, 1930), involving the Federal income tax. Where Congress has intended in legislation to affect Indians or their interests, the courts have held, the Indians specifically have been named or their property described. *Chouteau* v. *Commissioner of Internal Revenue*, *supra*, at p. 977; *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193, 198-200 (D.S.D., 1958); 34 Ops. Att'y. Gen. 439, 444 (1925).

In cases on the order of the instant litigation, therefore, the inquiry always is whether Congress has sufficiently and expressly made known an intent to permit the taking of Indian lands and thereby to terminate the rights and duties of the United States as trustee or guardian over tribal property. In *Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614, 617 (C.A. 9, 1959), for example, after giving heed to the rule of *Elk* v. *Wilkins*, *supra*, that general legislation does not apply to Indians unless the intent to include them is clearly expressed, the Court of Appeals for the Ninth Circuit found in the statute there under consideration "clear, plain, unambiguous" evidence of a Congressional purpose to permit condemnation of Indian lands. Similarly, in *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (C.A.D.C., 1958), the District of Columbia Court of Appeals sanctioned the appropriation of Indian tribal lands only after a finding that the intention of Congress to permit such action was perfectly obvious.[16] Accord, *United States* ex rel.

[16] Perhaps the most cogent recent judicial statement of the rule is in *United States* v. *2,005.32 Acres of Land, etc.*, 160 F. Supp.

Shoshone Indian Tribe v. *Seaton*, 248 F. 2d 154 (C.A.D.C., 1957).

The teaching of these cases is that the interest of the United States in Indian lands is so great, and the public policy of preserving and protecting the occupancy rights of Indian tribes is so important, that only the clearest manifestation of Congressional intent to terminate such interest and such policy will be respected. The ambiguous word, the doubtful implication, the unsaid phrase and the unexpressed intention will not be allowed to do duty as the will of Congress.[17]

193, 202 (D.S.D., 1958), where, in dismissing the Government's complaint in condemnation, the District Court observed:

> ". . . The Government admits that the five statutes relied upon do not specifically authorize such condemnation and the contention that these general enactments can be used by the United States, which is the guardian, to take the lands of the Indians, who are its wards, is wholly repugnant to the entire history of Congressional and judicial treatment of the Indians, and, further, is a view which is quite unacceptable to this court."

The court's conclusion in no way is weakened by the fact that, while on appeal and before argument on the merits, this case was reversed as moot on motion of the Government in view of the passage of the Act of September 2, 1958, Public Law 85-915.

[17] In terms of actual practice, Congress has recognized and established as Federal policy the principle that Indian tribal lands may be condemned only where specific permission is granted. See, for example, the statutes with respect to the U.S. Corps of Engineers collected in *United States* v. *2,005.32 Acres of Land, etc.*, *supra*, at footnote 16. Where, as here, a non-Federal instrumentality seeks to acquire property within an Indian reservation, express Congressional consent, of course, is mandatory. E.g., Act of May 17, 1957, 71 Stat. 31 (Catawba Indian Reservation); Act of May 4, 1932, 47 Stat. 146, amending the Act of February 28, 1919, 40 Stat. 1206 (Capitan Grande Indian Reservation); Act of May 10, 1926, 44 Stat. 498 (Pueblos of New Mexico). See further the Act of March 7, 1928, 45 Stat. 200, 212-13, in which

The interests of the public and of our dependent Indian tribes are too great to allow anything less than the most express and unambiguous language of Congress serve as authority for a seizure of Indian lands.

C. Relevant Canons of Statutory Construction Augment the Necessity for Explicit Congressional Consent to the Taking of a Portion of the Tuscarora Reservation.

The proposition that Federal safeguards over the Tuscarora Reservation may not be extinguished in the absence of express legislative authorization thus is not a banal generality, but rather reflects a very basic public policy, a policy of fostering care over Indian tribes in the possession of their lands. Inherent in that policy are various canons of statutory construction, each of which also serves as added support for the principle that specific Congressional consent is essential to the taking of tribal property.

Thus the fundamental rule that laws affecting Indians must be liberally construed for their benefit and protection becomes here relevant. *Choate* v. *Trapp*, 224 U.S. 665, 676 (1912); *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899). Equally relevant is the rule that "Doubtful expressions must be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). And since the basic problem in this case is whether the policy formulated by Congress in 25 U.S.C. § 177, and carried

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Congress deemed its express consent essential in order for the Federal Power Commission to license a project on the Flathead Indian Reservation.

forward by 25 U.S.C. § 233, has been nullified with respect to the Tuscarora Reservation, the general principle that repeals by implication are not to be favored becomes pertinent. *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946).

Moreover, in the context of this litigation, still another guide to statutory interpretation becomes material. In essence, the major issue in this case is whether Congress has empowered a non-Federal corporation, the New York Power Authority, to acquire full property rights and privileges in land in which the United States has an interest on behalf of the public. *Heckman* v. *United States*, 224 U.S. 413, 444-46 (1912); *Alonzo* v. *United States*, 249 F. 2d 189, 197 (C.A. 10, 1957). To obtain part of the Tuscarora Reservation, petitioner must demonstrate some relinquishment of the public interest in respondent's property, as exemplified in 25 U.S.C. §§ 177, 233, and as further manifested by the Government's duties of guardianship towards the Tuscarora Nation. Accordingly, the language of this Court in *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892), becomes of the highest relevance:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. [Citing cases.] Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. [Citing cases]."

Or, as stated in *Northern Pacific R. Co.* v. *United States*, 330 U.S. 248, 257 (1947):

> "But it is a familiar rule that where there is any doubt as to the meaning of a statute which 'operates as a grant of public property to an individual, or the relinquishment of a public interest,' the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean*, 111 U.S. 412, 437."[18]

See also *Blair* v. *Chicago*, 201 U.S. 400, 472-473 (1906); *Southern R. Co.* v. *United States*, 322 U.S. 72, 76 (1944); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104-105 (1949); *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).

The relevant canons of statutory construction thus both illume and strengthen the principle that explicit Congressional consent is absolutely essential before Tuscarora lands may be condemned or otherwise appropriated. And, of course, it is within the framework of those canons and that fundamental principle of law that petitioner's contentions must be examined.

II. THE EXPRESS CONGRESSIONAL CONSENT NECESSARY TO THE TAKING OF TUSCARORA LANDS CANNOT BE FOUND IN THE NIAGARA DEVELOPMENT ACT OF 1957, A GENERAL STATUTE WHICH MENTIONS NEITHER RESPONDENT NOR ITS RESERVATION

In an attempt to escape the impact of Section 4(e) of the Federal Power Act (discussed under Point III, *infra*), petitioners place prime emphasis upon the

[18] In the words of this Court in the *Slidell* case, 111 U.S. at 438, the rule that only express grants pass a public interest "is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the Act, and thus sanctions only open dealings with legislative bodies." This rationale is peculiarly appropriate to the statutory problems now before the Court, since both petitioners here seek a forfeiture of the public or Federal interest in the Tuscarora Reservation not by unequivocal grant, but by mere implication.

Niagara Development Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, claiming that this statute superseded the Power Act to the extent of fixing the precise facilities to be constructed for the Niagara Project. FPC Brief, pp. 28-41; SPA Brief, pp. 72-4. This argument was thoroughly reviewed and flatly rejected by the court below in the following terms (R. 427-28):

> "We have given careful consideration to the possibility that Congress, in adopting the 1957 legislation, was exercising for the United States the totality of its sovereign capacity in respect to this resource, and that the exercise of this power by Congress might be said to be without limitations. This might be in furtherance of a policy of Congress so to govern disposal of rights to develop hydroelectric power that the development would be in the manner the Congress, not an administrative agency or the courts, might select. [Footnote omitted.] Accordingly it might be argued that Congress in the 1957 Act made provision, by a single stroke, for the immediate development by the Power Authority of one of the nation's greatest resources, with all the concomitant factors of necessary works; seizure of property, and conditions of operation. * * *
>
> "We have considered that approach, but even as we have considered it we must reject it, for we find no escape from the language of the 1957 Act. As we have already pointed out, Congress did not issue a license; it authorized and directed its established agency to issue the license, and the Commission was ordered to include not only specified conditions but also 'those * * * required under the terms of the Federal Power Act.'"

Nothing said to this Court by petitioners in any way detracts from the force of the foregoing conclusion.

As a mere reading of the statute readily reveals, the Act of August 21, 1957, reflects a legislative policy decision designed to settle the seven-year controversy between public and private power advocates over development on the Niagara River. See Statement, pp. 7-8, *supra*. In Section 1(a) of the Act, Congress implemented a 1950 Treaty with Canada (1 U.S.T. 694) by directing the Commission to issue a license to the New York Power Authority "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." In Section 1(b) of the Act, Congress further directed the Commission to impose seven express conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act"—the conditions so specified being the concessions to private power companies, neighboring States, and other economic and political interests deemed essential to passage of the legislation. With respect to all other features of the Niagara Project, Congress directed the Commission "to issue a license pursuant to the provisions of the Federal Power Act. . . ." S. Rep. No. 589, 85th Cong., 1st Sess. (1957), p. 1; H. Rep. No. 862, 85th Cong., 1st Sess. (1957), p. 1.

The 1957 Act thus superseded the Federal Power Act in the sense that the statute deprived the Commission of any discretion in selecting a licensee. The 1957 Act also prescribed conditions, not here relevant, in addition to or as substitutes for conditions specified in the Federal Power Act. The 1957 Act, however, did not designate the location of the power project, describe the nature of the project works or otherwise

approve any particular engineering plan for power development, all technical matters within the special competence of the Commission to which the provisions of the Federal Power Act remained applicable.[19]

Petitioners' contention that Public Law 85-159 supplanted the Federal Power Act is further weakened, of course, by the fact that the Power Authority applied for its license under Section 4(e) of that Act (R. 391), and the license was issued by the Commission pursuant to Section 4(e). R. 404. The Government may not here impeach the very order it asks the Court to sustain. Similarly, petitioners' argument is undercut by the fact that, if Public Law 85-159 is construed to allow the Power Authority to condemn an Indian reservation, then the statute must also have empowered petitioner to condemn any Federal reservation.[20] There

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[19] In urging that Congress fixed the character of Niagara Project facilities, the Government seeks in this case to equate the Power Authority to the Corps of Engineers. FPC Brief, pp. 29-30. This analogy, of course, cannot stand up under scrutiny, since the substantive differences between a New York corporation and an arm of the United States Government are legion. Suffice it to say in this instance that whatever the legislative practice and judicial approach may be with respect to projects of the Corps, which are Federal works directly authorized by Congress, that practice and that approach have no bearing upon the Act of August 21, 1957, where Congress merely provided for the issuance of a license by the Commission to a State corporation for a non-Federal project.

[20] Tribal lands within Indian reservations, national forests, military reservations, and other lands or interests in lands owned by the United States generally are accorded the same treatment under the Federal Power Act, so the loss of protections over respondent's property logically would expose all such reservations to condemnation. Indeed, under petitioners' theory that the 1957 Act subordinated every public use to the Niagara Project, the Commission could have been obliged to issue a license even on Federal property, such as a national monument, which Congress specifically has removed from its licensing jurisdiction. 16 U.S.C. § 796(2).

is no language on the face or in the legislative history of the 1957 Act, however, indicating that Congress intended so to abdicate to a State corporation control over property in which the United States has an interest..

But the basic flaw in petitioners' thesis that Public Law 85-159 superseded the Federal Power Act is that the Act of August 21, 1957, cannot qualify under any circumstances as the express authority from Congress necessary for the taking of Indian tribal lands.

A. The Required Explicit Congressional Consent to the Acquisition of Tuscarora Lands Does Not Appear on the Face or in the Legislative History of Public Law 85-159.

Congress in the Act of August 21, 1957, quite clearly did not expressly authorize or otherwise consent to the taking of respondent's tribal property for power project purposes. To paraphrase the court below (265 F. 2d at p. 340), Congress did no more in the 1957 Act than name the licensee, describe the scope of the license and specify seven conditions to be included in the license by the issuing Commission. Not the slightest reference to or mention of the Tuscarora Indian Nation or the Tuscarora Reservation appears at any place on the face of the statute. And, as previously noted, not only was no attempt made in Public Law 85-159 to describe the lands necessary for the Niagara Project, but also the enactment unmistakably contemplated that the property to be acquired would be designated and approved under the terms of the Federal Power Act.

Hence the Act of August 21, 1957, does not evidence an express legislative purpose to forfeit the interest of the United States in the Tuscarora Reservation, or

in any way "clearly manifest" a Congressional intent to include Indian lands within the scope of the statute, as required by *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884). To find authority for the condemnation of respondent's property on such a record would be to disregard every relevant canon of statutory construction pronounced by this Court, including the rules: (a) that laws affecting Indians must be liberally construed for their benefit and protection, set forth in *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); (b) that doubtful expressions, if any, must be resolved in favor of the Indians, set forth in *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); (c) that repeals by implication are not favored, set forth in *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); and (d) that only express statutory grants will serve to relinquish a public interest, set forth in *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892). Indeed, to sanction a taking of Tuscarora lands on the basis of Public Law 85-159 would be to give effect to a "purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the Act," and thus would defeat the principle of "open dealing with legislative bodies" laid down by the Court in *Slidell* v. *Grandjean*, 111 U.S. 412, 438 (1884).

Moreover, the legislative history of the Act of August 21, 1957, conclusively demonstrates that Congress had no awareness or knowledge that part of the Tuscarora Reservation might be desired for the Niagara Project. The debates in the House of Representatives and in the Senate on H.R. 8643, which eventually became Public Law 85-159, contain not one word about respondent or respondent's lands. 103 CONG. REC. 13194-211, 13364-5, 14437-56 (1957). The Reports of the House

and Senate Committees on Public Works on H.R. 8643 and its companion bill, S. 2406, respectively, make not even the vaguest reference to the remotest possibility that Indian lands would be covered by the project. H. Rep. No. 862, 85th Cong., 1st Sess. (1957); S. Rep. No. 539, 85th Cong., 1st Sess. (1957).[21] And, finally, not a single indication that Tuscarora lands might be included in any plans for the project was given at any of the Committee hearings.

After the most exhaustive of searches, petitioners before this Court can point (FPC Brief, pp. 32-3) to only one obscure reference to the Tuscarora Reservation in seven years of hearings on the Niagara Project —a statement in one of the alternative plans proposed by the Power Authority prior to 1956 that a reservoir of 41,000 acre-feet could be constructed covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reservation,"[22] i.e., entirely outside the bounds of respondent's lands. Since the storage reservoir was increased to 60,000 acre-feet after the Schoellkopf disaster in 1956, the Government's argument runs, it can be inferred that Congress knew respondent's lands then would be needed. Even assuming that knowledge of a statement buried deep in 1955 Hearings may be imputed to Congress in 1957—a dubious proposition at best—petitioners' conclusion still does not logically follow. In the absence of information to the contrary,

[21] "There is no mention of Indian land in the committee reports, the debates, or the directive statute; the Indians do not appear to have testified at the hearings; and in the plan considered by Congress there was no apparent necessity for the taking of Indian land." Note, 72 HARV. L. REV. 1372, 1373-4 (1959).

[22] Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st Sess., p. 132.

and given the known Federal interest in tribal property, Congress more likely concluded in this situation that other land was available and the Tuscarora Reservation thus would remain untouched.[23]

The legislative history of the Niagara Development Act of 1957, therefore, reveals not even a "shadow of a shade of an idea," cf. *Atlantic Works* v. *Brady*, 107 U.S. 192, 200 (1883), that the Niagara Project in any way would affect the Tuscarora Indian Reservation.[24]

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[23] Petitioners' handling of legislative materials in this case presents an interesting study in value judgments. For the Government, a written statement in 1955 that the storage reservoir would be *off* the Tuscarora Reservation leads to a presumption in 1957 that Congress knew the reservoir would be *on* that Reservation. FPC Brief, p. 49. For both petitioners, on the other hand, the uncontradicted testimony of a witness from the Corps of Engineers in 1956 to the effect that the Niagara Mohawk Company owned all the land needed for the Niagara Project is worthy of no consideration. FPC Brief, pp. 50-51; SPA Brief, p. 78; see footnote 24, *infra*.

[24] If anything, the legislative history of the 1957 Act affirmatively demonstrates that Congress did not intend expressly or by implication to sanction the alienation of any part of the Tuscarora Reservation. In 1956, for example, a representative of the Corps of Engineers gave testimony, never contradicted, that the Niagara Mohawk Company owned all the property needed for the project. Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 2d Sess. (1956), p. 12. Moreover, the next witness from the Power Authority did nothing to change that record. *Id.* at pp. 23, 25 and 27-28.

In addition, the House Committee report in 1957 speaks of a "reservoir with surface area of 850 acres and a storage capacity of 22,000 acre-feet" (H. Rep. No. 862, 85th Cong., 1st Sess., p. 6), while the Senate Committee report mentions "a storage reservoir . . . with a capacity of about 30,000 acre-feet." S. Rep. No. 539, 85th Cong., 1st Sess. (1957), p. 5. A project so constructed could not have used Tuscarora land. R. 291.

Finally, Senator Chavez, Chairman of the Committee on Public Works and one of the leading proponents of the bill, declared during the Senate debate on H.R. 8643 that "No dams or pro-

Under such circumstances, the search for Congressional consent appropriately may be limited to the words of the statute itself. See *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 100 (1958); *Dameron* v. *Brodhead*, 345 U.S. 322, 326 (1953). Here, as in the *Dameron* case, the Court is "shown that nothing indicates that a straightforward application of the language as written would violate or affect the clear purpose of the enactment." And the language of Public Law 85-159, as confirmed by the legislative history, in no way manifests the express Congressional consent requisite to the acquisition of respondent's lands.

B. The Necessary Intent of Congress to Authorize the Alienation of Tuscarora Lands Cannot Be Implied From the Nature or Scope of the Niagara Project

Petitioners do not seriously attempt to derive the requisite Congressional consent to the taking of respondent's property from the express words of Public Law 85-159 or from any express statement in the legislative history of the 1957 Act. The utter absence of such language precludes any conclusion that Congress specifically directed or authorized the utilization of Tuscorara lands for the Niagara Project. Petitioners' emphasis, rather, centers on the contention, adopted by the Court of Appeals for the Second Circuit in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958), that an "implied" intent to allow the condemnation of a portion of the Tuscarora Reservation can be "inferred" from the 1957 statute upon consideration of the extensive nature of the project and the proximity of the required reservoir

visions for storage of water are necessary." 103 CONG. REC. 14438 (1957). Although Senator Chavez erred, there is no indication that this statement ever was corrected.

to the Indians' lands. Or, as stated by the Solicitor General (FPC Brief, p. 53), the "necessary Congressional authorization" can be supplied from two allegedly demonstrable factors: (1) "the necessity to use Indian lands for a project specifically authorized by Congress"; and (2) "the presumption that Congress knew of Indian lands in the vicinity."

As has heretofore been demonstrated, a finding of the requisite Congressional consent "by implication" violates every relevant principle of statutory construction. Apart from the rule that general acts of Congress do not affect Indians unless an intent to include them is clearly manifest and the further rule that laws affecting Indians must be liberally interpreted for their benefit and protection, the principle of refusing to read implications into otherwise clear statutes where a non-governmental party seeks to acquire land in which the United States has an interest outlaws this effort to establish "consent by implication." See *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550 (1892), and *Northern Pacific R. Co.* v. *United States*, 330 U.S. 248, 257 (1947), discussed at pp. 36-7, *supra*.

Moreover, the three cases cited by petitioners (FPC Brief, pp. 53-5) in support of the theory of "consent by implication" are inapposite.[25] *Henkel* v. *United*

[25] In addition to the cases discussed in the text, the Government also cites (Brief, p. 57) a series of decisions to the effect that the power of eminent domain "extends to property already devoted to an equivalent public use if the authorized project requires, for its execution, the taking of such property." These cases, however, all relate to land originally devoted to non-Federal public uses, and the doctrine therein expressed never has been invoked where, as here, a State agency seeks to acquire lands in which the United States has an interest. *Cf. United States* v. *Carmack*, 329 U.S. 230, 243 at fn. 13 (1946). For this reason, as well as the principles of

States, 237 U.S. 43 (1915), for example, involved not the condemnation of tribal land, but rather involved the voluntary sale by an Indian family to the United States of property to which the Indians had no legal right, but which they used and occupied under an agreement which expressly reserved to the Federal Government a power to acquire the land for certain public improvements. Unlike the Act of August 21, 1957, which refers to no land in particular, the statutes under consideration in *Spalding* v. *Chandler*, 160 U.S. 394 (1896) and *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114 (1894) constituted specific grants by Congress to third parties of specifically defined territory held in the name of the United States.[26]

Finally, even if it were possible to authorize the alienation of Indian lands by implication, that implication cannot properly be drawn on the facts of this case. In other words, the two elements which the Solicitor

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statutory construction previously analyzed, the cases are inapplicable to Indian lands.

The Power Authority (Brief, pp. 81-2) relies on *Barker* v. *Harvey*, 181 U.S. 481 (1901) as authority for the proposition that general acts of Congress will be held to apply to Indians. As this Court pointed out (181 U.S. at p. 492), however, Section 16 of the law there under consideration specifically referred to Indians so a legislative intent to include them within its scope was manifest.

[26] The *Spalding* case is distinguishable on two further factual grounds: (a) the exclusion of Indian lands from the statute there under consideration would have nullified the entire grant to the State of Michigan, whereas in this case the Commission found as a fact that "other lands are available for reservoir use" (R. 395); and (b) Congress was on notice prior to passage of the statute there involved that the canal right-of-way would run through Indian lands, whereas in this case the legislative history of the 1957 Act shows unmistakably that Congress had no idea Indian lands would be desired for the Niagara Project.

General concedes (FPC Brief, p. 53) are together essential to "consent by implication" actually do not here exist.

1. *Tuscarora lands were not necessary for the Niagara Project as of August 21, 1957.* The heart of petitioners' argument with respect to implied consent is that in August of 1957, when Public Law 85-159 was enacted, Congress was aware that property within the Tuscarora Reservation would be required in order to build the Niagara Project to the planned extent. No such knowledge fairly can be attributed to Congress for the very simple reason that respondent's lands were not so needed at the time the 1957 Act came into being. As the General Manager of the Power Authority subsequently testified (R. 270, 274), the boundaries of the storage reservoir had not then even been determined. See Statement, p. 10, fn. 4, *supra*. Indeed, the plain and unvarnished fact in this case is that on January 30, 1958, the Commission in issuing a license to the Power Authority still could find that "other lands are available for reservoir use if the Applicant [petitioner herein] is unable to acquire the Indian lands, although alternative lands may be more expensive." R. 395.

During the hearings before the Commission following remand of this case by the court below, the Power Authority submitted exhibits and presented testimony purporting to demonstrate that respondent's property is essential to the Niagara Project.[27] The most that

[27] The Tuscarora Nation objected (R. 24) to this line of proof as outside the scope of the order on remand and the Commission's own Notice of Further Hearing (see Statement, pp. 14-15, *supra*), but the objection was overruled by the presiding officer. R. 24, 41-2, 380. Respondent then filed an appeal from this ruling with

this evidence shows, however, is that as of December, 1958, sixteen months after passage of Public Law 85-159, locating the storage reservoir wholly off the Tuscarora Reservation would cause petitioner considerable expense.[28] What happened in the interim is that after passage of the Act of August 21, 1957, and notwithstanding the pendency of this litigation, the Power Authority abandoned all alternatives,[29] and proceeded on the single-minded assumption that it could and would acquire Tuscarora lands. R. 275-76.

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the Commission pursuant to Rule 1.28(a) of the Commission's Rules of Practice and Procedure (R. 43-6), but no action ever was taken on that appeal. In view of the favorable decisions of the Commission and the court below, respondent has not been in a position further to contest the improper admission of such evidence.

[28] In its Opinion and Finding of February 2, 1959, the Commission still did not declare that the storage reservoir could not be constructed to full capacity off respondent's property, but only that such a course would cause delay, disruption and expense. R. 487. With respect to this possibility, the court below correctly observed (R. 431):

> "We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation."

[29] When mapping "alternative reservoir sites" in November, 1958, for example, petitioner treated the area outside respondent's reservation on which it already was working as a constant and made no allowance for raising the reservoir dikes thereon. R. Ex. 15-22. The basic excuse for not raising the reservoir dikes, though, was merely the fact that the machinery ordered by the Power Authority after January, 1958, would work less efficiently under such circumstances. Eventually, in applying on March 2, 1959, for an amended license, petitioner conceded that the machinery could be modified to handle a greater drawdown. Presumably, machinery could have been purchased at the very outset which would have achieved maximum capacity through a higher reservoir on a smaller land area wholly off the Tuscarora Reservation. R. 231.

To undo, modify or shift in 1959 what was improvidently commenced in 1957 undoubtedly will cost money and cause disruption.[30] The Power Authority, however, may not in good conscience profit from its own mistakes, or by unilateral acts place itself in a position more advantageous than it otherwise would occupy. According to the Commission, the Authority was not entitled to a finding on January 30, 1958, that Tuscarora lands were required for the Niagara Project and, since the legal relationships between the parties remain unchanged, it is no more entitled to such a finding today. To reach back a 1959 conclusion into the mind of Congress as constituted in 1957, to find a 1957 intent on the basis of 1959 facts, in short to inject an after-acquired necessity retroactively into an earlier Congressional act, is to pervert the theory of "consent by implication" beyond all bounds of reason.

2. *The legislative history of the 1957 Act provides no basis for a presumption that Congress knew Tuscarora lands might be included within the Niagara Project.* Petitioners do not claim that Congress expressly was advised that respondent's property might be needed for the Niagara Project, but rather assert that such knowledge may be imputed to Congress from

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[30] As pointed out by Commissioner Hussey, concurring in the denial of the Power Authority's petition for rehearing (R. 510-11), petitioners still have not proved that 1383 acres or any lesser amount of Tuscarora land is absolutely necessary for the project to reach maximum capacity. If additional land outside the Tuscarora Reservation were used in conjunction with the higher dikes now planned, a 60,000 acre-feet storage reservoir wholly off respondent's property seems entirely feasible. The facts in this regard could have been made known, of course, if the Commission had scheduled the hearing on the Power Authority's application for an amended license which it noticed for hearing more than eight months ago. 24 *Fed. Reg.* 1711; see Statement, p. 16, *supra*.

certain general information about the local terrain. FPC Brief, pp. 48-50; SPA Brief, pp. 33-38. Apart from the obscure reference to the Tuscarora Reservation previously discussed (pp. 43-4, *supra*), these materials consist of (a) a "background" map referred to by the Corps of Engineers in 1956, (b) the testimony of a Seneca Indian in 1951, and (c) two brochures allegedly made a part of Committee records in 1957.[31] Except possibly to a skilled cartographer residing on the Niagara Frontier, none of these items in fact gives the slightest indication that respondent's property might be included within the project.

(a) The Government's primary reliance (Brief, pp. 48-9) upon a general survey map which was not even made a part of the legislative record hardly needs comment. Attributing to Congress the knowledge that Tuscarora lands would be covered by a storage reservoir on the basis of an unsubmitted document which, without specifying the project location, at most places the reservation in the same general area, goes far to show that Congress in fact had no idea respondent's

[31] The Government (Brief, p. 50) also refers to the fact that the readers of a Niagara Falls newspaper plus "responsible members of the Tuscarora Nation" were advised in 1957 that Indian lands were desired for the storage reservoir. The relevance of this information to what members of Congress may be presumed to know is not explained. Indeed, the very fact that respondent's members did not protest when a map was distributed among them in 1957 demonstrates that even those individuals directly familiar with the terrain did not conclude at the time that the Power Authority really intended to appropriate their lands. The "silence of the respondent Nation," to which the Solicitor General refers (FPC Brief, p. 50), only supports the thesis that the intent and the words of a statute "are to be taken in the sense in which they will be understood by that public in which they are to take effect." *United States* v. *Isham*, 17 Wall. (U.S.) 496, 504 (1873); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 397 (1956).

property might become involved. Even the most astute member of Congress cannot be expected to synthesize such amorphous information.

(b) The testimony of a Seneca Indian, so heavily stressed by petitioners (FPC Brief, p. 52; SPA Brief, pp. 35-7, 76), was nothing more than another recitation of a 140-year old land claim to the effect that the Seneca Nation owns a "Mile Strip" along the Niagara River. The indulgent attitude of individual members of Congress in 1951 to the stale claims of a Seneca Indian cannot be translated into an intent on the part of Congress six years later to authorize a taking of lands unquestionably owned by the Tuscarora Nation.[32]

(c) Finally, the two brochures introduced by the Power Authority as Exhibits 191 and 218 during the hearings before the Commission mention neither the Tuscarora Nation nor the Tuscarora Reservation, and thus in no way identify respondent's lands with the Niagara Project. R. 151-52, 268-70; R. Ex. 35-44, 131-49. The map in Exhibit 191 (R. Ex. 42), for example, does not show property lines, and the Authority's own witness conceded that he could not have located the Tuscarora Reservation in the area of the storage reservoir prior to the time he began work on the project and thus became intimate with local geography. R. 157-58; see also R. 268-70. Moreover, another witness for the Power Authority was unwilling to testify that any member of Congress ever had read the brochures. R. 270-74.

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[32] Sections 3(2) and 4(e) of the Federal Power Act protect Indian reservations, such as respondent's property, not lands subject to Indian claims regardless of their validity.

The salient fact, however, is that Exhibits 191 and 218 actually form no part of the legislative history of the Act of August 21, 1957. Although allegedly "introduced into evidence" (SPA Brief, p. 33), the report designated as Exhibit 191 at the 1958 Commission hearing in fact is not listed as an exhibit in the table of contents and, as a study of the printed text reveals, is nowhere made a part of the official transcript of the 1957 hearings published by the Senate Committee on Public Works.[33] Hearings before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st Sess., on Niagara Power Development, dated April 10-13, 1957. Similarly, although allegedly submitted to the House Committee on Public Works (FPC Brief, p. 35), Exhibit 218 in fact is dated eight days *after* H.R. 8643, the bill which eventually became Public Law 85-159, was finally reported by that Committee (103 CONG. REC. D446), and was distributed two days *after* the House Committee report was printed.[34] H. Rep. No. 862, 85th Cong., 1st Sess., dated July 23, 1957, p. 1; R. Ex. 134, 151. The fact that the Power Authority's brochures may have been privately cir-

[33] Petitioners seek to remedy this fatal deficiency with a 1958 certificate from Senator Robert S. Kerr to the effect that Exhibit 191 was made a part of the record before his Subcommittee. R. 383-85. Senator Kerr's certificate, to which respondent made a timely objection (R. 384), of course, is not admissible to vary legislative history or to serve as legislative history. *Ramspeck* v. *Federal Trial Examiners*, 345 U.S. 128, 143 at fn. 9 (1953).

[34] Originally, the Power Authority maintained that Exhibit 218 was submitted to the House Committee during the hearing in 1957 on the Niagara Project. R. 386-87. The facts are that the House Committee on Public Works did not hold any hearings in 1957 on bills relating to development of the Niagara River. H. Rep. No. 862, 85th Cong., 1st Sess. (1957), p. 3. Now petitioner claims only that the brochure still is in the files of the Committee. SPA Brief, p. 38.

culated to individual members of Congress does not make these documents any part of the legislative history of the 1957 Act. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-4 (1931); *State Wholesale Grocers* v. *Great Atlantic & Pac. Tea Co.*, 154 F. Supp. 471, 484-5 (D., Ill., 1957); *National School of Aeronautics* v. *United States*, 142 F. Supp. 933, 938 (C. Cls., 1956); *United States* v. *St. Paul Mercury Indemnity Co.*, 133 F. Supp. 726, 737 (D., Nebr., 1955); *Blackfeet & Gros Ventre Tribes* v. *United States*, 119 F. Supp. 161, 167 (C. Cls., 1954).

Such is the stuff of which petitioners' argument on "consent by implication" is made. A finding on this flimsy evidence that Congress authorized the taking of any portion of the Tuscarora Reservation would strip all meaning from the doctrine that legislative consent is essential to the alienation of Indian tribal lands.

III. THE TUSCARORA RESERVATION IS AN INDIAN RESERVATION WITHIN THE MEANING OF SECTIONS 3(2) AND 4(e) OF THE FEDERAL POWER ACT AND, THEREFORE, MAY NOT BE LICENSED BY THE COMMISSION FOR USE IN THE NIAGARA PROJECT IN THE ABSENCE OF THE FINDING REQUIRED BY SECTION 4(e)

The rule of law is clear—to recapitulate briefly two fundamental legal principles involved in this case—that the United States exercises paramount control over the disposition of Indian lands and that some form of express consent by the United States is essential before respondent's property may be condemned or otherwise alienated. Point I, pp. 23-37, *supra*. As has been demonstrated, and as the court below concluded (R. 427), Congress in the Act of August 21, 1957, 71 Stat. 401, did not so authorize the taking of a portion of the Tuscarora Reservation for use in the

Niagara Project. The most important question which remains, therefore, is whether the necessary consent can be found, as petitioners claim, in the Federal Power Act, 16 U.S.C. § 791a *et seq.*

The required consent of the Federal Government to the licensing of Indian lands for project purposes, of course, cannot be spelled out from general provisions of this statute for a reason heretofore explored in detail—the time-honored and now well-settled doctrine that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see pp. 32-4, *supra*. If at all, therefore, the required consent must be found in Sections 3(2) and 10(e) of the Act, 16 U.S.C. §§ 796(2) and 803(e), which specifically refer to "tribal lands embraced within Indian reservations," and in Section 4(e), 16 U.S.C. § 797(e), which allows the licensing of projects within such reservations provided certain findings can be made and other conditions be satisfied.

Petitioners urge, though, that the Tuscarora Reservation is not an Indian reservation within the meaning of Sections 3(2), 4(e) and 10(e) of the Act. FPC Brief, pp. 58-73; SPA Brief pp. 47-71. Assuming, *arguendo*, the validity of this contention, then the Federal Power Act does not furnish authority under any circumstances for the licensing of respondent's property. In brief, if the Tuscarora Reservation is not under the coverage of the Federal Power Act to the extent of gaining the benefits of Sections 3(2), 4(e) and 10(e), then the Tuscarora Reservation is not by these very sections placed within the scope of the Federal Power Act to the extent of losing the benefits of 25 U.S.C. §§ 177 and 233. Stated another way,

the express consent of the United States so essential to the lawful condemnation or other alienation of Indian tribal lands cannot logically be found in statutory provisions which are said at the very same time not to apply to such Indian tribal lands.

The basic flaw in petitioners' argument, however, is that the Tuscarora Reservation in law and fact is an Indian reservation within the meaning of Section 3(2) of the Federal Power Act, and thus is fully protected by that portion of Section 4(e) which prohibits the licensing of tribal lands by the Commission in the absence, as in this case, of a finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e).

A. Respondent's Lands Are Tribal Lands Within an Indian Reservation Subject to the Supervision of the Secretary of the Interior

Section 3(2) of the Federal Power Act speaks of "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2). The Court of Appeals ruled in this case that the "land here in dispute is indubitably 'tribal lands embraced within Indian reservations' within the usual meaning of that phrase." R. 429. As the following discussion will demonstrate, the court below undoubtedly was correct.

1. *Reservation Status*—The fact that the Tuscarora Reservation is an Indian reservation can hardly be disputed.[35] Indeed, petitioners do not question this obvious truth.

[35] R. 365-66; R. Ex. 234-38, 242; see also "Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877" (G.P.O., 1877), at p. 167.

2. *Tribal Status*—The fact that the Tuscarora Reservation consists wholly of tribal land is supported by every relevant legal authority as well as by all of the evidence in this case, and thus also should be beyond debate. Congress and the Executive Departments, for example, repeatedly have recognized tribal title to the entire territory within the exterior boundaries of respondent's reservation. House Doc. No. 1590, 63d Cong., 3d Sess., 1915, pp. 12-13; quoted in Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), p. 423; "General Data Concerning Indian Reservations", prepared under the direction of the Commissioner of Indian Affairs, U.S. Department of the Interior, dated October 15, 1929 (G.P.O., 1930), at p. 10. Indeed, as recently as January 4, 1954, the Department of the Interior advised Congress that the "dominant title" to the Tuscarora Reservation still is in the Nation. R. 366.

Moreover, the Power Authority's own exhibits in this case clearly show that the Tuscarora Reservation was granted to, and acquired in the name of, the Tuscarora Nation. R. Ex. 165-70, 197-202. The deed from Secretary of War Dearborn runs to the "Tuscarora Nation of Indians", and is so recorded (R. Ex. 196-200); there is nothing in the record to show any subsequent change of ownership. Finally, in view of the application to respondent's property of 25 U.S.C. §§ 177 and 233 (see Point I, *supra*), the tribe is barred as a matter of law from alienating its lands without the consent of the United States—which consent has never been granted—and thus any purported conveyance of its interests in the Tuscarora Reservation would be invalid. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888-91 (C.A. 2, 1958).

Notwithstanding the overwhelming weight of law and evidence to the contrary, petitioners contend that a substantial portion of the Tuscarora Reservation has been "allocated" to individual Indians and thus no longer constitutes "tribal land."[36] FPC Brief, pp. 12, 72; SPA Brief, pp. 25-29, 59-60. What has happened, of course, is that the Nation has assigned use-rights in its property to its members in accordance with tribal custom[37]—an act which no more diminishes respondent's ownership of the assigned territory than would an ordinary lease or permit. Even the New York courts recognize that the Nation possesses a compensable interest in assigned lands (*Dixon* v. *State*; 4 Misc. 2d 76 (1956)), and, as previously noted, the controlling Federal law flatly bars respondent from

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[36] The Power Authority concedes that the "Nation is still the holder of the record title" (Brief, p. 29), but nonetheless contends that "the individual allottees own complete property rights. . . ." *Ibid.* The very evidence cited by petitioner, however, proves that respondent retains substantial property interests in land assigned to individual Tuscarora Indians. R. 136; N.Y. Pub. Serv. Doc. No. 18, 875-1958, referred to in SPA Brief, at pp. 27-28. Furthermore, it is interesting to compare the Power Authority's thesis that respondent's possession of record title does not mean that its property is tribal land with petitioner's other argument that the holding of bare legal title to Indian reservations by the United States means that this territory is Federal property for purposes of Sections 3(2) and 4(e) of the Federal Power Act.

[37] Petitioners are aware that the Tuscarora Reservation is not subject to allotment and in fact has not been allotted under the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* FPC Brief, p. 72; SPA Brief, p. 25. Under the 1887 Act, tribal lands divided in severalty become the property of the individual allottee and the tribal estate is terminated. Allottees on Indian reservations in the State of New York, on the other hand, possess mere use-rights on lands still held in common ownership and would be called "assignees" elsewhere in the country.

disposing of its title. 25 U.S.C. §§ 177 and 233; 58 Decisions of the Interior Department 218 (1942). Accordingly, the Tuscarora Reservation cannot contain anything but tribal land.

3. *Guardianship Status*—Lastly, the fact that the Tuscarora Reservation still is under the supervision of the Federal Government is not open to serious challenge.[38] The court below so ruled (R. 423-24), as did the Court of Appeals for the Second Circuit in related litigation. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888-91 (1958); accord, *United States* v. *Forness*, 125 F. 2d 928 (C.A. 2, 1942). The New York Court of Appeals has reached the same conclusion. *People* ex rel. *Cusick* v. *Daly*, 212 N.Y. 183 (1914); *Mulkins* v. *Snow*, 232 N.Y. 47 (1921). And recent commentators unanimously are in accord. Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem in Federal-State Relations*, 8 BUFFALO L. REV. 1 (1958); Note, 72 HARV. L. REV. 1372 (1959); *N.Y. Special Legislative Committee on the Revision and Simplification of the Constitution*, Leg. Doc. (1958) No. 57, Ch. V, pp. 33-42 (reproduced in part at R. 377-80).

Furthermore, the record in this case shows that the Department of the Interior in fact has exercised guardianship over the Tuscarora Reservation in the name of the United States on repeated occasions. In an

[38] In denying the Tuscarora Nation's application for rehearing of the original license order, the Commission expressed the view that respondent's "lands are not within an Indian reservation under supervision of the Secretary of the Interior. . . ." R. 413. The court below characterized this statement as "patently in error." R. 424. The Government apparently has abandoned the contention in this Court, and only the Power Authority remains unconvinced. SPA Brief, pp. 30-32, 60-64.

Opinion dated May 4, 1900 (R. Ex. 234-38), for example, Assistant Attorney General Willis Van Devanter—later an Associate Justice of this Court known for his learned opinions in the field of Indian law—ruled that respondent's lands could not be sold, leased or otherwise alienated without specific permission from Congress, and since that date the Secretary of the Interior consistently has refused to approve leases not so authorized. R. Ex. 239-41. As recently as April 17, 1958, the Commissioner of Indian Affairs held the contract between the Tuscarora Nation and its attorneys subject to the protective provisions of R.S. 2103, 25 U.S.C. § 81, governing agreements by Indian tribes "relative to their lands. . . ." R. 333-34. And in a letter dated July 9, 1958, the Solicitor (now Undersecretary) of the Interior Department advised respondent's counsel that "we recognize that certain Federal responsibilities for Indians in New York still do exist." R. Ex. 242.

In response to H. Con. Res. 108 of the 83d Congress (R. Ex. 243), the Department of the Interior in 1954 actually submitted draft legislation to Congress aimed at terminating the guardianship of the United States over the Tuscarora Nation, including capitalization of the annual annuity paid to respondent under the Treaty of November 11, 1794, 7 Stat. 44.[39] R. 358-70; 100 Cong.

[39] During recent years Congress has approved a number of statutes ending guardianship for various Indian tribes. See, for example, the Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 *et seq.* (Klamath); the Act of August 13, 1954, 68 Stat. 724, 25 U.S.C. § 691 *et seq.* (Western Oregon); the Act of September 1, 1954, 68 Stat. 1099, 25 U.S.C. § 741 *et seq.* (Paiute); the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C. § 791 *et seq.* (Wyandotte); the Act of August 2, 1956, 70 Stat. 937, 25 U.S.C. § 821 *et seq.* (Peoria); the Act of September 21, 1959, Public Law 86-322

REC. 624, 1083, 1174 (1954). Congress, however, did not even seriously consider the proposal (Original Transcript, p. 5362). Yet only Congress may declare when the special relationship between Indian tribes and the Federal Government shall cease.[40] *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921); *United States* v. *Nice*, 241 U.S. 591, 598 (1916); *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 315 (1911); *Dewey County* v. *United States*, 26 F. 2d 434, 435 (C.A. 8, 1928). The Tuscarora Reservation, therefore, still remains subject to the supervision of the Federal Government.

B. Tuscarora Lands Owned in Fee by the Nation, Subject to a Restriction on Alienation Without the Consent of the United States, Enjoy the Same Protections and Are Entitled to the Same Treatment Under the Federal Power Act as Any Other Tribal Lands Embraced Within an Indian Reservation

Both the law and the facts are evident that the Tuscarora Reservation consists of tribal lands within an Indian reservation subject to the supervision of the Secretary of the Interior. In describing the licensing powers of the Commission, Section 4(e) of the Federal Power Act refers to "the public lands and reservations of the United States." 16 U.S.C. § 797(e). The term "reservations" in turn is defined in Section 3(2) for all purposes under the Act as including "na-

(Catawba). These laws were deemed necessary to cut off Federal protections and assistance even though tribes such as the Wyandotte, Peoria and Catawba had far less contact with the United States than the Tuscarora Nation.

[40] The recognition of an Indian tribe is a political decision with which the courts will not interfere. *United States* v. *Holliday*, 3 Wall. (U.S.) 407, 419 (1866). The Government concedes in this case (FPC Brief, p. 55, fn. 40) that respondent is a recognized tribe.

tional forests, *tribal lands embraced within Indian reservations,* military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 16 U.S.C. § 796(2); emphasis supplied. The conclusion thus seems inescapable that the Tuscarora Reservation by definition is a reservation of the United States under the provisions of the Federal Power Act and, in particular, within the framework of Section 4(e).

Petitioners claim, however, that the plain words of the statute do not have their ordinary meaning, and contend instead that the term "reservations" in the Federal Power Act comprehends only lands owned in fee by the United States or in which the United States has some real property interest, and not lands to which respondent or any other Indian tribe may have fee title. This thesis is untenable for a variety of reasons.

1. *The plain language of the Act precludes any distinction between tribal lands owned in fee by the Indians and tribal lands held in trust by the Federal Government.* The phrase "tribal lands embraced within Indian reservations" is all-inclusive and by itself admits of no differences or limitations in terms of the holder of record title. Where the meaning of statutory words is so clear, these words uniformly are presumed to be used in their ordinary and usual sense, and the duty of interpretation does not arise. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Lewis v. United States*, 92 U.S. 618, 621 (1876). Moreover, the language of Section 3(2) actually implies an affirmative intent not to exclude property held by Indians in fee. Specifically, Congress carefully distinguished in the Act between "tribal lands," which

were included in the definition of reservations, and individually-owned lands within Indian reservations, which were not.[41] If Congress had intended further to restrict the definition of reservations to cover only Indian lands in which the United States has some proprietary interest, appropriate language for that purpose could and would have been employed. *Wabash R. Co.* v. *United States*, 175 Fed. 5, 11 (C.A. 8, 1910).

Secondly, Section 3(2) of the Act is not so constructed or punctuated as to convey the thought that the phrase "owned by the United States [etc.]" must modify the term "tribal lands [etc.]"[42] The definition of reservations far more easily breaks down into four wholly separate and distinct categories: (a) national forests; (b) tribal lands embraced within Indian reservations; (c) military reservations; and (d) other

[41] Lands allotted in severalty to individual Indians may be condemned for any public purpose under 25 U.S.C. § 357. No comparable authority exists for the condemnation of tribal lands, regardless of whether the Government or the Tribe is the possessor of the fee.

[42] Despite the Government's allegations to the contrary (Brief, pp. 60-61, fn. 43), petitioners' argument still seems to claim too much. In other words, the reading of Section 3(2) advanced by petitioners would combine the phrases "tribal lands embraced within Indian reservations" and "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." Such a construction would virtually eliminate all Indian lands from the statutory definition of "reservations" since most Indian reservations, including the Warm Springs Reservation under consideration in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), were established by treaty or agreement with the United States rather than under the "public land laws."

The Government's alternative reading of Section 3(2) with respect to this point is completely consistent with respondent's assertion that the phrase "owned by the United States [etc.]" does not modify the term "tribal lands [etc.]."

lands and interests in lands owned by the United States. This view that the enumerated terms each denote distinct categories, rather than serving as mere illustrations of a single category—lands owned by the United States—is supported by the separate treatment accorded two types of reserved property, national monuments and national parks, which once were included but now specifically are excluded from the definition of reservations under the Act. 16 U.S.C. § 796(2).

Lastly, the records of the Bureau of Indian Affairs show that the eighteen Pueblo tribes under jurisdiction of the United Pueblos Agency, New Mexico, owns 689,576 acres of land in fee, and the Zuni Pueblo in New Mexico holds an additional 17,635 acres of land in fee, or a total for these Indians alone of over 700,000 acres of tribal land possessed in fee.[43] A comprehensive study undoubtedly would prove that the total amount of tribal lands within Indian reservations in which the United States does not have a proprietary interest is far greater. There is no evidence on the face of the Federal Power Act or elsewhere that Congress ever intended to exclude from the coverage of Section 3(2) and the protections of Section 4(e) such a substantial area of land which had been held or might be acquired by Indian tribes within their reservations and in their own names.

2. *The legislative background and legal environment in which the Federal Power Act is set militate against*

[43] Apparently no complete compilation of the acreage owned by tribes in fee is in existence. The figures set forth in the text were obtained by counsel from local officials of the Bureau of Indian Affairs in New Mexico. In addition, the Secretary of the Blackfeet Tribe in Montana has advised counsel for respondent that these Indians possess over 30,000 acres of land in fee.

a conclusion that the statutory definition of reservations is limited to Indian tribal lands in which the United States has a proprietary interest. Prior to passage of the Water Power Act of June 10, 1920, 41 Stat. 1063, rights of way through Indian reservations for power purposes were granted under the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959, and the Act of March 4, 1911, 36 Stat. 1253, 43 U.S.C. § 961. The 1911 Act, which is illustrative of these two similar statutes, reads in part as follows:

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered . . . to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon *the public lands, national forests, and reservations of the United States* for electric poles and lines for the transmission and distribution of electrical power. . .: *Provided*, That such right of way shall be allowed within or through *any national park, national forest, military, Indian, or any other reservation* only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest. . . ." (36 Stat. 1253; emphasis supplied.)

Thus, the 1901 and 1911 Acts governing rights of way for power purposes across "public lands . . . and reservations of the United States" not only deal with the same subject matter, but also are strikingly similar in language to Section 4(e) of the Federal Power Act.[44]

[44] According to the Secretary of the Interior, the 1920 Water Power Act conferred upon the Federal Power Commission the jurisdiction and control over rights of way for power purposes, previously exercised by the Interior Department under the 1901

An interpretation of the term "Indian reservations" as used in the former statutes, therefore, should be most persuasive in determining the scope of the latter law.

Respondent has not found a single court decision on this point.[45] In an Opinion concerning the lands of the Five Civilized Tribes, on the other hand, the Solicitor of the Interior Department did resolve the precise question as follows (58 Decisions of the Interior Department 85 (1942) at p. 99):

> "Whether or not the acts of February 15, 1901 and March 4, 1911, are applicable to lands of the Five Civilized Tribes depends upon whether such lands prior and subsequent to allotments in severalty may properly be classified as Indian reservations. I find little difficulty in holding that prior to allotment the lands belonging to the Five Civilized Tribes were legally constituted Indian reservations. * * * *It is true that the lands were conveyed in fee to the nations by patents issued by the United States,* but this did not terminate the guardianship relation existing between the Indians and the United States and they continued to be subject to the legislation of Congress enacted in the exercise of the Government's guardianship over the nations and their affairs. In this and in

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and 1911 Acts, "except as to projects involving Indian allotments or where the electrical energy is to be developed other than hydraulically." 51 Decisions of the Interior Department 41 (1925); 53 Decisions of the Interior Department 674, 678 (1932).

[45] In *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 215-17 (1943), this Court ruled that lands allotted in severalty to individual Kickapoo Indians under a special act of Congress in fact did not constitute a reservation. Apparently no court has decided in a case involving an actual reservation whether that term, as employed in the 1901 and 1911 Acts, applies to Indian reservations generally or to some more limited category of land.

other respects *the lands stood in exactly the same category as the lands of other legally constituted Indian reservations.*" (Emphasis supplied.)

The chief legal officer of the Department primarily responsible for executing the 1901 and 1911 Acts, therefore, has determined that these statutes apply to Indian reservations generally, regardless of whether legal title to the land is in the tribes or in the United States. This administrative construction of related laws is entitled to great weight in interpreting Section 4(e) of the Federal Power Act, particularly since the author of the Opinion was the late Felix S. Cohen, characterized by this Court as "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U.S. 1, 8 (1956).

Moreover, the Interior Department Solicitor's analysis of the predecessor Acts of February 15, 1901 and March 4, 1911, places Section 3(2) of the 1920 Water Power Act in a legislative setting far different and far more favorable to respondent than the Government draws. FPC Brief, pp. 61-2. As the statute originally was drafted and passed by the House of Representatives, reservations were defined as meaning "lands and interests in lands owned by the United States. . . ." S. Rep. 180, 66th Cong., 1st sess., p. 10. The Senate then inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other" at the beginning of the definition (*Ibid.*), thus bringing this language close to the text of the 1901 and 1911 Acts. By this change, in which the House subsequently concurred, Congress obviously intended to redefine "reservations" in conformity with the earlier statutes and thus to include

within the scope of Section 3(2) property in addition to lands technically "owned" by the United States.[46]

Finally, the restricted reading which petitioners would give to the phrase "tribal lands within Indian reservations" is contrary to 175 years of dealings between the Federal Government and Indian tribes, which experience forms the legal background of the Federal Power Act. Specifically, the courts consistently have ruled that Federal protections apply equally to all lands of tribes recognized by the United States,[47] whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *7,405.3 Acres of Land, etc.*,

[46] This thesis is consistent with the cryptic remark of the House conferees that the amendment "recasts the House definition of 'reservations'." H. Rep. 910, 66th Cong., 2nd sess., p. 7. The Commission's argument that the amendment effected "no change in substance" (Brief, p. 62), on the other hand, would ascribe to Congress a wholly meaningless act. See further the colloquy on the floor of the Senate (59 Cong. Rec. 1100 (1920)) to the effect that only the licensing provisions of the Act cover tribal property which "clearly belongs to the Indians. . . ."

[47] Neither petitioner has cited a single case contrary to the proposition that lands owned by Indian tribes in fee simple are accorded exactly the same treatment as tribal lands held in trust by the Federal Government. The fact, as noted by the Commission (Brief, pp. 71-2), that Congress may have enacted statutes which specifically distinguish between Indian reservations and lands allotted in severalty to individual Indians (e.g., Section 4 of the Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. § 311) or which specifically relate to Indian reservations created by treaty, act of Congress or Executive Order (e.g., Section 1 of the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331) in no way detracts from the fact that the terms "tribal lands" or "Indian reservations" used in a general statute never have been construed as applying only to property owned by the United States.

97 F. 2d 417 (C.A. 4, 1938);[48] 18 Ops. Att'y. Gen. 235 (1885). Although the opportunity frequently has arisen, Congress has not seen fit to modify this well-settled doctrine. No reason has been advanced for carving out an exception to the general rule in the Federal Power Act and, in the absence of a positive legislative intent to deviate from the pattern of prior and existing law, no such exception should be found.

3. *The United States has a sufficient interest in the Tuscarora Reservation to bring respondent's lands within the scope of Section 3(2) and under the protective provisions of Section 4(e) of the Act.* Section 3(2) of the Act, in reciting the various categories of reservations, speaks not only of *lands* owned by the United States, but also of *interests in lands* owned by the United States. In the instant case, the United States possesses such an interest in the lands of the Tuscarora Reservation. More particularly, by virtue of 25 U.S.C. §§ 177 and 233, the United States exercises a restraint over the alienation of respondent's

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[48] As stated by Judge Parker for a unanimous court (97 F. 2d at p. 442):

> "The determinative fact is that the federal government has assumed towards them the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent."

Contrary to the Power Authority's contentions (Brief, pp. 53-4), incidentally, the lands involved in this case were held *in fee* for twenty-three years by the Eastern Band of Cherokee Indians of North Carolina through a tribal corporation organized under State law. *United States* v. *Wright*, 53 F. 2d 300, 309 (C.A. 4, 1931). Nonetheless, the court rejected a claim of adverse possession against the property.

property without Federal consent. This restriction on alienation, coupled with the general guardianship relation of the United States to the Tuscarora Nation, is a sufficient interest in the lands to enable the Federal Government to sue to enforce the restriction. *Minnesota* v. *United States*, 305 U.S. 382, 387 at fn. 1 (1939); *Heckman* v. *United States*, 224 U.S. 413 (1912); *Alonzo* v. *United States*, 249 F. 2d 189 (C.A. 10, 1957); cf. *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926). And that restriction and relationship create a sufficient Federal interest in these lands to bring the Tuscarora Reservation within the concept of "interests in lands owned by the United States."[49]

4. *Restricting the term "reservations" in Section 3(2) of the Federal Power Act to tribal lands which the Federal Government may dispose of under the Property Clause of the Constitution would violate legislative intent by excluding from that statutory definition the bulk of all Indian reservations in the United States.* Petitioners insist that the only tribal lands which may be classified as reservations within the meaning of Section 3(2) are tribal lands which

[49] In the words of the Court of Appeals for the Tenth Circuit in *Alonzo* v. *United States*, 249 F. 2d 189, 197 (1957):

> "We are of the opinion that the Governmental interest in the instant action is as great as it would be if the fee to the lands involved were in the United States. Indeed, since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty to protect the interests of its wards may be even greater that it would if it were suing in its own behalf with respect to its own lands."

Compare Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), at p. 289, in which it is noted that "tribal lands, even though held by the tribe in fee, may be considered public lands of the United States for the purpose of erecting federal buildings thereon. . . ."

are the property of the United States or in which the United States has a real property interest. Such reservations, the argument runs, are licensed on the same basis as other Federal property, with the jurisdiction of the Commission stemming exclusively from the Property Clause of the Constitution (Article IV, Section 3). The fatal weakness in this contention is that, as a matter of law, most Indian reservations are not Federal property on the order of national forests or military reservations, and may not lawfully be disposed of by the United States as if they were.

To be specific, except in relatively rare instances, such as tracts purchased with Federal gratuity funds or some Executive Order reservations, tribal lands do not "belong" to the United States and simply do not constitute property which the United States may treat as its own. *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-76 (1937); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 109-10 (1935). Regardless of whether the Indians hold the fee, as in the *Creek* case, or the land is held in trust by the United States, as in the *Shoshone* case, the Government has no power "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation. . . ." *Shoshone Tribe* v. *United States*, *supra*, at p. 497, quoting *United States* v. *Creek Nation*, *supra*, at p. 110. In other words, under the decisions of this Court, all lands to which Indian tribes have recognized title, whether in trust or in fee, not only are property in which the United States has an interest, but also are private property entitled to the same constitutional protections, and the classification of a trust reservation as Federal property and a fee reservation as non-

Federal property does not connote any substantive difference.[50]

Thus, the United States as a landowner freely may authorize the use of ordinary Federal property by a licensee of the Commission pursuant to the Property Clause of the Constitution. With respect to virtually all "tribal lands embraced within Indian reservations," on the other hand, the United States is not a landowner itself, but rather is a trustee or guardian for another landowner, the Indians. Under such circumstances, even though the United States may have record title, the Indians have vested private property rights in their recognized tribal lands,[51] private property

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[50] Petitioners argue (FPC Brief, pp. 68-71; SPA Brief, pp. 65-8) that respondent's fee lands may be acquired for project purposes only through eminent domain proceedings under Section 21 of the Act, 16 U.S.C. § 814, while trust reservations are the subject of an annual charge under Section 10(e), 16 U.S.C. § 803(e). As the cases cited in the text declare, where recognized title exists both classes of tribal land are entitled to the same treatment. In this regard, although the question was not litigated below and is not here at issue, the Brief of Respondent in Opposition to the Petition notes (p. 22, fn. 10):

> "Since the Tuscarora Reservation originally was purchased by the United States with tribal funds held in trust by the United States, the payment of an annual fee to the United States for the benefit of the Tuscarora Nation pursuant to Section 10(e) for any portion of respondent's lands used under a valid Commission license might very well be entirely appropriate."

On the other side of the coin, the fact that title may be in the United States is not a bar to condemnation if Congress has authorized such action. 25 U.S.C. § 357, discussed in *Minnesota* v. *United States*, 305 U.S. 382 (1939).

[51] *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), at pp. 277-78, and *United States* v. *Alcea Band*, 329 U.S. 40 (1946), at p. 52.

rights which may not be licensed or otherwise disposed of by the Federal Government by virtue *solely* of an Article in the Constitution dealing with the property of the United States.[52] In order validly to deal with such private property rights, the United States also must exercise its authority over the management of tribal affairs pursuant to the Indian Commerce Clause of the Constitution (Article I, Section 8).

Limiting the licensing jurisdiction of the Commission on "tribal lands embraced within Indian reservations" to powers derived exclusively from the Property Clause of the Constitution, therefore, would eliminate the bulk of all tribal lands in the country from the statutory definition of reservations—leaving within the scope of Section 3(2) only tribal lands which are truly owned by the United States and in which the Indians have no compensable interest. There is not the slightest indication, however, of any legislative intent

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[52] Of the two decisions cited by the Government (FPC Brief, p. 65, fn. 47) as purportedly showing Indian lands to be Federal property, one, *United States* v. *Celestine*, 215 U.S. 278 (1909), is a criminal case where the real issue was Federal jurisdiction and not Federal ownership. The reference to the Property Clause in the second case, *United States* v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329 (C.A. 10, 1944), is purely gratuitous because the same result—protecting tribal trust lands from State taxation—can be reached under the Federal instrumentality doctrine and the Indian Commerce Clause. *United States* v. *Thurston County*, 143 Fed. 287, 289-90, 292 (1906), accord, *United States* v. *Rickert*, 188 U.S. 432, 437 (1903), and *United States* v. *Wright*, 53 F. 2d 300, 308-9 (1931). Moreover the court in the *Fremont County* case, while speaking of a Federal proprietary interest in tribal trust lands, nonetheless also recognized the rights of the Indian beneficiaries. Neither of the foregoing decisions, and no other case cited by petitioners, stands for the proposition that the United States may dispose of a tribe's vested interest in an Indian reservation (as contrasted with the Government's interest) under the Property Clause alone.

so to restrict the inclusive term "Indian reservations" to what is a minor fraction of current tribal landholdings, or so to restrict the protections of the Act, particularly the first proviso of Section 4(e), to the one class of tribal lands not legally entitled to any protection. On the contrary, the conclusion is unavoidable, as the court below determined (R. 430-31), that Congress in dealing with Indian reservations under the Federal Power Act was speaking generally and, consequently, also exercised its authority to regulate commerce with Indian tribes.[53] Apart from the foregoing considerations, this conclusion finds additional support in the language of Section 10(e) of the Act, 16 U.S.C. § 803(e), which distinguishes in the payment of annual charges between Federal "lands or other property" (significantly, the term "reservations" is not here used) and "tribal lands embraced within Indian reservations."[54]

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[53] Petitioners' reliance upon the reference to the Property Clause in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443 (1955), is wholly misplaced since, as this Court pointed out (p. 444), the Indians had consented to the project and the matter of tribal title was not at issue; accordingly, the question of whether the Indian Commerce Clause also applied never was reached in the case. Moreover, if the definition of reservations were restricted to lands belonging to the United States, there would be no need to make annual payments to the Indians for the use of such lands under Section 10(e).

[54] The Tuscarora Nation was eligible but elected not to adopt a constitution under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 987, 25 U.S.C. § 476. Haas, *Ten Years of Tribal Government Under I.R.A.* (U.S. Indian Service, 1947), p. 18. If the Nation had so organized, respondent would have the right not only to "approve" (or presumably disapprove) the annual charge fixed under Section 10(e) of the Federal Power Act, but also would have a vested right "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ." 25 U.S.C. § 476.

The fact that Congress did not specifically mention the Indian Commerce Clause in the Federal Power Act is, of course, immaterial, since a reference to the constitutional source of legislative authority is not necessary in any statute. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 657 (1890). What is important is that the power of Congress to regulate commerce with Indian tribes has been described as "Plenary", *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin*, 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd*, 326 U.S. 496 (1946); *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876). The power is sufficiently broad to sustain the payment of an annual charge for the use of tribal property,[55] and, as has been heretofore noted, is also sufficiently comprehensive to cover lands held by Indians in fee. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); Cohen, *Handbook of Federal Indian Law*

The Indian Reorganization Act does not distinguish between tribal lands held in fee and tribal lands held in trust. If Section 10(e) applies only to trust lands and Section 21, 16 U.S.C. § 814, authorizing condemnation, applies to fee land, as petitioners contend, then there is an irreconcilable conflict between the Power Act and Section 16 of the I.R.A. with respect to the licensing or acquisition for a project of fee lands owned by an organized tribe, *e.g.*, Blackfeet. See footnote 43, *supra*. No such conflict exists, of course, if lands held by the Indians in fee are considered within the statutory definition of reservations.

[55] The rule is settled that, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work*, 266 U.S. 481, 485 (1925).

(G.P.O., 4th Ed., 1945), p. 321. In the words of this Court in the *Sandoval* case:

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation *the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders,* whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." (231 U.S. 28 at pp. 45-6; emphasis supplied.)

Unless substantially all American Indian tribes are to be denied the benefits of the Federal Power Act, the Tuscarora Nation is entitled to just such "fostering care and protection" in this case.

5. *To deprive the Tuscarora Reservation of the benefits of Section 4(e) would be contrary to well-settled Government policies to safeguard Indian tribes in the use and enjoyment of their lands.* Congress in Section 4(e) of the Federal Power Act authorized the Commission to issue licenses on reservations, including tribal lands embraced within Indian reservations, only after a finding that the proposed project facility "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e). In so providing Congress was concerned not with the ownership, but rather with the use of reservation property. Stated another way, Congress in the first proviso of Section 4(e) expressed a policy decision—the judgment that private power projects, regardless of their intrinsic importance, still fall lower on the scale of public values than lands in

which the United States has a governmental interest.[56] Thus, under the terms of the statute, the Commission may not issue a license where, and to the extent that, a prospective project will conflict with a Federally protected land use.

With respect to Indian reservations in particular, Congress has further provided that tribal lands may not be alienated in the absence of express legislative consent. 25 U.S.C. § 177. In a sense, Section 4(e) of the Federal Power Act is an exception to this general rule, since the Commission may authorize the use of Indian lands under conditions approved by the Secretary of the Interior, if the licensed project will not be inconsistent with the purpose for which the reservation first was established. The basic pattern of Government policy to safeguard Indian tribes in the undisturbed use and enjoyment of their property, however, remains unimpaired.

As has previously been demonstrated, and as the United States here concedes, the Tuscarora Reservation clearly falls under the sheltering provisions of 25 U.S.C. §§ 177 and 233. Point I, pp. 23-31, *supra*. There is not the slightest indication in the Act that such Federally protected property, alone among all lands in which the United States has a governmental interest and contrary to overall legislative policy, is to be deemed of less public value than a power project and thus subordinate to a conflicting Commission li-

[56] Evidence of this legislative determination that reservations involve a higher and better use of land than power projects is found in the fact that Congress, less than one year after passage of the 1920 Water Power Act, deprived the Commission of any jurisdiction to issue licenses within national parks and national monuments. Act of March 3, 1921, 41 Stat. 1353.

cense. Certainly there is no evidence that Congress, in creating a minor exception to 25 U.S.C. § 177 in Section 4(e) of the Federal Power Act, intended thereby also to single out respondent's reservation and other tribal lands owned in fee for the loss of all special protections under the law.

Moreover, even if the language of Section 4(e), or the definition of "reservations" in Section 3(2), were to be considered ambiguous, this Court repeatedly has ruled that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). As previously noted (Point I, page 35; *supra*), a corollary canon of statutory construction is that treaties with Indian tribes and laws affecting Indians must be liberally construed for the benefit and protection of the Indians. *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-5 (1942). In the light of these principles of law, reflecting long-established Government policies to safeguard Indian tribes in the full use and enjoyment of their lands, the first proviso of Section 4(e) cannot be construed as being inapplicable to the Tuscarora Reservation.

C. Respondent Is Entitled to the Benefit of the Uncontested Finding by the Commission Under Section 4(e) That the Niagara Project Will be Inconsistent With the Purposes for Which the Tuscarora Reservation Originally Was Established.

The foregoing discussion shows that lands owned in fee by the Tuscarora Nation and other Indian tribes enjoy the same protections and are entitled to the same treatment under the Federal Power Act as any other tribal lands embraced within an Indian reservation. On remand from the court below, the Commission found as a fact that the project facilities which the Power Authority proposes to construct on respondent's reservation cannot meet the test of the first proviso of Section 4(e), and "that the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." R. 489. The Commission's conclusion has not been appealed or otherwise challenged by either petitioner, and is not at issue in this case. Respondent thus has a right to the full benefit of that uncontested finding and, consequently, under the terms of the first proviso of Section 4(e), also is entitled to an order by the Commission specifically excluding the Tuscarora Reservation from the scope of the Power Authority's license.

IV. THE COURT OF APPEALS PROPERLY DIRECTED THE COMMISSION TO EXCLUDE TUSCARORA LANDS FROM THE SCOPE OF THE LICENSE ISSUED TO THE POWER AUTHORITY

The Court of Appeals correctly decided: (1) that the express Congressional consent necessary to the taking of Tuscarora lands cannot be found in the Niagara Development Act of 1957; and (2) that the Tuscarora Reservation is an Indian reservation within

the meaning of Sections 3(2) and 4(e) of the Federal Power Act and, therefore, may not be licensed by the Commission for use in the Niagara Project in the absence of the finding required by Section 4(e). Since the Commission could not make the requisite finding, the court below properly ordered petitioner to exclude respondent's lands from the scope of the license issued to the Power Authority.

A. The Court Below Was Not Precluded From Deciding the Validity of the Commission's License Order by the Decision of the Court of Appeals for the Second Circuit

On January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for construction of the Niagara Project (R. 391-410), over the objections of the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its reservation for a water storage reservoir. On February 28, 1958, respondent filed a timely petition for rehearing in accordance with Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), which the Commission denied on March 21, 1958. On May 16, 1958, less than 60 days after the denial of the rehearing application and within the time allowed by law, respondent filed in the Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's licensing order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia court thereby required "exclusive jurisdiction, to affirm, modify or set aside such order in whole or in part."[57] *Ibid.*

[57] The Power Authority contends (Brief, p. 90) that the court below did not acquire any jurisdiction at the time the petition for

The Power Authority now urges (Brief, pp. 87-95) that the court below, notwithstanding the "exclusive jurisdiction" conferred upon it by statute, in effect was precluded from determining the validity of the Commission's license order by a decision of the Court of Appeals for the Second Circuit in related litigation.[58] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958). This thesis is untenable. The argument is based upon: (1) a false premise that the Court of Appeals for the Second Circuit passed upon either the validity of the Power Authority's license or the necessity for a Section 4(e) finding; and (2) a further false premise that any such rulings, if made, would defeat the exclusive jurisdiction of the Court of Appeals for the District of Columbia Circuit under 16 U.S.C. § 825*l*(b) "to affirm, modify or set aside" the Commission's order granting the license.

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review was filed, and acquired exclusive jurisdiction only on June 25, 1958, when the Commission filed the transcript of record. This contention is erroneous, but need not be discussed further since the date when the court below acquired the "exclusive jurisdiction" provided by statute and here conceded by petitioner is not material in this litigation.

[58] The Power Authority's thesis that the Tuscarora Nation freely chose to litigate in the Second Circuit is somewhat of an overstatement. Faced with the appropriation of its lands on April 15, 1958, before the validity of the license order could be determined on review, respondent in fact had no other Federal forum in which to protect its property. Jurisdiction over the Power Authority in the District of Columbia, of course, could not have been obtained unless petitioner voluntarily decided to intervene in the review proceedings.

The Power Authority's attempted appropriation of Tuscarora lands on April 15, moreover, wholly negates its contention that respondent was not aggrieved until the Commission's order of May 5, 1958. SPA Brief, pp. 89, 92. This argument, flatly rejected by the court below (R. 425), is not seriously pressed in this Court.

A mere reading of its opinion discloses that the Second Circuit was aware that a "petition for review of the Commission's order is presently pending before the Court of Appeals for the District of Columbia." *Tuscarora Nation of Indians* v. *Power Authority, supra,* at p. 890. Consequently, that court held only "that the Power Authority of the State of New York *as a licensee* of the Federal Power Commission . . . is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act." *Ibid.* at p. 894; emphasis supplied. In other words, for the purpose of determining whether and, if so, how petitioner could acquire Indian lands, the Second Circuit simply assumed as an existing fact—but did not consider or decide—the validity of a license which the court below had not yet set aside.

Even if the Court of Appeals for the Second Circuit had been so rash as to venture an opinion on the validity of the Power Authority's license or the application of the first proviso in Section 4(e) to the Tuscarora Reservation, however, any such ruling could have no bearing upon the outcome of this litigation. In the first place, the validity of petitioner's license was not before the Second Circuit, so its views thereon would be pure dicta.[59] *Ash Sheep Co.* v. *United States,*

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[59] As Mr. Justice Harlan noted in passing upon the Tuscarora Nation's application for a stay of the Court of Appeals mandate (*Tuscarora Nation of Indians* v. *Power Authority,* 79 Sup. Ct. 4 (1958)):

> "[T]he validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. 16 U.S.C. § 825*l*(b); cf. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334-337. That being so it is difficult for me to

252 U.S. 159, 170 (1920). Secondly, the law is well-settled that the validity of a Federal Power Commission license may be adjudicated only in the court where a petition for review is properly filed. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958); *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C.A. 3, 1941). The statutory direction that the court below shall have "exclusive jurisdiction" to affirm, modify or set aside the Commission's order means just what it says. 16 U.S.C. § 825*l*(b).

The doctrine here urged by the Power Authority would make a mockery of the review provisions of the Federal Power Act. Note, 72 HARV. L. REV. 1372, 1374 (1959). According to petitioner, the validity of a Commission license or, more particularly, all issues bearing upon the validity of that license may be tested in *any* court prior to the lodging of the record in the court where a petition for review is filed. Thus, if a licensee institutes condemnation proceedings under Section 21, 16 U.S.C. § 814, immediately after the license order is issued and the condemnation court enters judgment while the Commission still has a petition for rehearing under consideration, as required pursuant to 16 U.S.C. § 815*l*(a), an aggrieved party will be wholly barred on grounds of res judicata from seeking direct judicial review of the order. Congress

believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power Authority's right to acquire Tuscarora's lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See §§ 3(2), 4(e), and 21 of the Federal Power Act, 16 U.S.C. §§ 796(2), 797(e), 814."

quite obviously never intended the validity of licenses to be finally determined in collateral proceedings to which the Commission is not even a party.[60]

B. The Court Below Did Not Exercise an Administrative Function by Ordering the Commission to Exclude Respondent's Reservation From the License

Petitioners complain (FPC Brief, pp. 73-74; SPA Brief, pp. 95-7) that the court below erred in remanding the case to the Commission with instructions to amend its order "so to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." R. 533. Quite plainly, however, the court below in no way invaded the area of discretion residing in the Commission. Having decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below properly directed that the license be amended in such a way as to eliminate all impact upon the reservation.

The court's ruling on the merits did not leave room for the exercise of discretion by the Commission on the inclusion of respondent's lands within the Niagara

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[60] If the Second Circuit had ruled in respondent's favor on the issues which the Power Authority says were litigated, the Commission would not have been bound thereby. Moreover, on the other side of the coin, the doctrine of res judicata can hardly be said to apply in a case where, as here, the Power Authority, intervenor below, is a party as a matter of grace and not as a matter of right.

The most that can be said of petitioner's res judicata argument in this case is that, if the Tuscarora Reservation were not protected by Section 4(e), then the Second Circuit decision to the effect that respondent's property may be condemned under Section 21 would be binding. The court below, however, did not necessarily disagree with this conclusion. R. 430-31; compare footnote 50, *supra*. Furthermore, the point is of little practical value to the Power Authority where, as here, Section 4(e) prevents the inclusion of Tuscarora lands under the license.

Project. Petitioners, therefore, cannot and do not suggest that a different order on remand in any way would change the ultimate disposition of this case with respect to the Tuscarora Reservation, the only property here involved. Similarly, there was no need for the court below in its order on remand expressly to permit the Commission to consider alternative or smaller reservoir sites. Those issues then were and still are pending before the Commission on the application for an amended license filed by the Power Authority.

In short, there was nothing for the Commission to reconsider on remand in light of the narrow holding and direction of the Court of Appeals, and for this Court to require such a remand would be a meaningless gesture. This case thus is entirely unlike *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), where the lower court had tried to exercise an administrative function in its order.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We do not attempt to consider all of respondent's arguments. We believe that most have been fully answered in our main brief, and some do not need any direct reply. We confine ourselves in this brief to a discussion of respondent's misinterpretations of our position and some of its other errors.

I

THE 1957 NIAGARA DEVELOPMENT ACT AND THE NECESSITY TO TAKE TUSCARORA LANDS

At the outset, we must correct respondent's misstatement of our position on the 1957 Act. In Point I of our main brief, we urged that (1) Congress'

authorization, in Public Law 85–159, of a project with capacity to utilize *"all"* the waters available under the Canadian treaty contemplated and comprehended production of 1,800,000 kilowatts of dependable capacity with a 60,000 acre-feet reservoir; (2) Congress superseded any limitations in the Federal Power Act inconsistent with the achievement of this Project; (3) Tuscarora lands are indispensable to a Project of this size and scope; and (4) Public Law 85–159 and the Federal Power Act, together with the objective necessity to use Tuscarora lands, thus constitute a sufficient grant of power to condemn those lands for the Niagara Project (FPC main brief, pp. 26–47, 51–54).

Respondent errs, therefore, when it poses, as the "heart of petitioners' argument", the question whether Congress was actually aware in August 1957 that Tuscarora lands would be required (Resp. brief, p. 48, pp. 43–44). As a separate proposition, we have also urged that Congressional knowledge of respondent's lands must be presumed and for that reason, too, there was implied authorization to condemn them; the Second Circuit so held. FPC main brief, pp. 48–51, 54–55; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 893–894 (C.A. 2), certiorari denied, 358 U.S. 841. But wholly apart from such Congressional knowledge (actually shown or presumed), the power to condemn likewise arises from the very scope of Public Law 85–159 and the objective necessity to utilize part of respondent's land for the type of project authorized by Congress.

A. SCOPE OF PUBLIC LAW 85–159

1. Respondent (Brief, pp. 38, 40, 41) quotes and paraphrases the conclusion of the District of Columbia Circuit that the Niagara Development Act did no more than direct the issuance of a license and select the licensee. However, respondent utterly fails to confront the overwhelming record of hearings, reports, and debates, cited by the Government, which demonstrate that the premises of the court below were erroneous. To take one central fact, the court of appeals apparently believed that the pump-storage reservoir in suit was never mentioned to Congress (R. 426). On the contrary, we have shown irrefutable Congressional knowledge and contemplation of the pump-storage reservoir, its indispensable role in the project plans, its approximate location, and the alternative proposed sizes culminating in the 60,000 acre-feet reservoir eventually licensed (FPC main brief, pp. 30–36). We think it is clear that Public Law 85–159 contemplated the 60,000 acre-feet reservoir (and the other project works) as part of a project with 1,800,000 kilowatts of dependable capacity, *i.e.*, "capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159.

It is equally clear that Congress in 1957 approved the engineering plan, resolved all major issues relating to the Niagara Project, superseded any contrary provisions in the Federal Power Act, and intended to make certain that this long-awaited development would go forward without delay or qualification

(FPC main brief, pp. 36–41). Congress did contemplate that the license would be issued under the Power Act and the needed property would be acquired under the condemnation provisions of that Act (FPC main brief, p. 38; Resp. brief, pp. 40–41). But just as the Power Act standards for choice of a licensee were superseded by Congress (which respondent concedes), so were any other provisions which conflict with or hinder a development of the type, size, and scope directed by Congress.

2. As we have indicated, respondent has for the most part ignored the seven-year record of legislative consideration leading to Public Law 85–159. However, it has, mainly in the relative obscurity of its footnotes, made certain errors which should be corrected:

(*a*) One such statement is that the 1957 committee reports spoke of smaller reservoirs, with 22,000 or 30,000 acre-feet storage capacity (Resp. brief, p. 44, n. 24). However, the 1957 reports themselves stated that these were earlier plans (by the Bureau of Power and the Corps of Engineers) which had been superseded after the Schoellkopf disaster in June 1956. The reports also stated explicitly that the new plans were those of the New York Power Authority and that the dependable capacity was being increased to 1,800,000 kilowatts on a 17-hour basis, along with the "pump-storage and pumping-generating facilities" required "to achieve this amount of firm capacity". S. Rept. 539, 85th Cong., 1st Sess., pp. 5–6; H. Rept. 862, 85th Cong., 1st Sess., p. 7; quoted in FPC main brief, p. 34, fn. 21.

(*b*) Another inaccuracy is the statement that Exhibits 191 and 218, showing the Power Authority's plans for the enlarged project after the Schoellkopf disaster, are not part of the legislative history of the Niagara Development Act, and that a Power Authority witness "was unwilling to testify that any member of Congress ever had read the brochures" (Resp. brief, pp. 52–54). In the first place, the witness cited did explicitly testify that, at the 1957 Hearings, every member of the Senate Subcommittee looked at Exhibit 191 (R. 264, 271). The hearing transcript discloses that the chairman, Senator Kerr, inquired about the very map in Exhibit 191 which shows the enlarged reservoir (R. 265—see FPC main brief, p. 35, fn. 22). Independent confirmation is provided by the above-cited 1957 committee reports which referred to the Power Authority's plans and set forth the new figures for installed and dependable capacity—presumably taken from Exhibit 191 (R. Ex. 40).

As to the size of the pump-storage reservoir required by the augmented capacity, respondent makes no mention of Exhibit 13 (R. Ex. 1–9) which was introduced at the Congressional hearings in 1957 (R. 3) and which demonstrated that 60,000 acre-feet were needed for 1,800,000 dependable kilowatts on a 17-hour daily basis (R. Ex. 4–6). This size reservoir was also listed among the specifications for the Project in Exhibit 218 (R. Ex. 132), submitted to the House Committee on Public Works and to all Senators and Representatives in July 1957 (R. 244–250, 386–387; R. Ex. 151–154). The evidence that these exhibits were actually before Congress during consideration

of the Niagara Development Act brings them within the legislative materials available to courts, which properly utilize "every relevant aid to construction": *United States* v. *Dickerson*, 310 U.S. 554, 562; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544.[1]

(*c*) Still another error is the use of the statement of Senator Chavez in 1957, "No dams or provisions for storage of water are necessary", as relevant here (Resp. brief, pp. 44–45, n. 24). As we have shown, and the Senator himself explained, the Niagara River provides a natural flow and drop; no artificial means were required for the flow and drop (FPC main brief, p. 36). That is all that he meant. It is difficult to believe that respondent, by this reference, really

[1] In *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627, 630–631 (E.D. Mich.), affirmed, 172 F. 2d 953 (C.A. 6), the district court accepted affidavits of a member of the Senate Appropriations Committee and the general counsel of the Reconstruction Finance Corporation which showed, as a fact, that the committee had utilized a communication from the agency in preparing the bill. Cf. *Gardner* v. *The Collector*, 6 Wall. 499, 511; *United States* v. *Webster*, Fed. Cas. No. 16,658.

Such evidence of what a committee (or Congress) actually *did or had before it* is entirely different from the inadmissible use of later testimony by individual Congressmen concerning their intent at the time of passage or the later use of material never before Congress (as in the cases cited in respondent's brief, pp. 53–54). Moreover, in this case Congress was aware that the new Project plans were those of the Power Authority. S. Rept. 539, 85th Cong., 1st Sess., p. 6. The plans would therefore be material even in the absence of Congressional knowledge of them in 1957, since Congress may authorize such developments on the basis of plans in the process of preparation. See *infra*, pp. 11–12.

seeks to question the legislative purpose to authorize and require the pump-storage reservoir.

(*d*) Finally, we refer to the incorrect statement that there was "uncontradicted testimony" at a House hearing in 1956 that Niagara Mohawk Company owned all the property needed for the Project (Resp. br., p. 44, fns. 23, 24). We have already cited the contradictory testimony given at the same hearing by Power Authority counsel (FPC main brief, p. 50), and it is now quoted in the footnote below.[2]

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[2] Mr. DONDERO. If the State of New York obtains the right to develop this power you must either buy or condemn from the private power companies the property which they now own and use for the same purpose?

Mr. MOORE. No; they are not using it for the same purpose. The power companies acquired a lot of land with the idea of using it for the same purpose but the property the private companies now use for power purposes is different from those that will be used for this development. * * *

* * * * *

Mr. DONDERO. Just a moment. Suppose what you are saying is true. You would still have to condemn or buy the property which they own to build a plant at Lewiston. Is that right?

Mr. MOORE. We would have to condemn or buy from private people the land necessary for this project. In some cases it is Niagara Mohawk, and I assume in some cases others.

Mr. DONDERO. When you say "private people" you mean private power companies?

Mr. MOORE. They may be individuals, or farmers, or school teachers, or anything.

Hearing on Niagara Power before the House Committee on Public Works, 84th Cong., 2d Sess., pp. 27–28. R. 260–261. Moreover, the power to condemn was never an issue (FPC main brief, pp. 50–51).

B. THE NECESSITY TO USE TUSCARORA LANDS.

Respondent seeks now to rely upon a statement of the Federal Power Commission, in January 1958, that "other lands are available for reservoir use" (R. 395), on the ground that "the legal relationships between the parties remain unchanged" (Resp. brief, p. 47, fn. 26, p. 50). But the indispensability of Tuscarora lands to the Niagara Project contemplated by Congress is not a matter of "legal relationships", but of objective fact. The evidence leaves no doubt, and the Commission has found, that respondent's lands *are* essential to attain a 60,000 acre-feet reservoir, without which, in turn, the Niagara Project will not have the dependable capacity intended by Congress (FPC main brief, pp. 43–47).[3] If respondent's lands are not included, the Niagara Project will fall seriously short of the goals set for it by Congress.

In its brief in opposition to certiorari, respondent urged that the Commission's conclusion to this effect was "sheer dicta", not that it was untrue (Brief in Opposition, p. 16, fn. 5). Nevertheless, respondent now claims (Brief, pp. 49–50) that its lands appear essential only because the Power Authority voluntarily abandoned all alternatives. The record is flatly to the contrary; respondent's lands appear essential be-

[3] In our view, it is irrelevant that this objective fact was not definitely established on the record at the time the Niagara Development Act was passed (August 1957), at the time the license was initially issued (January 1958), or at the time of the interlocutory decision of the court below (November 1958). It is enough that it was definitely established and found by the time of the final ruling below.

cause they *are* essential. The reservoir location is limited to the north by the Niagara escarpment, to the south by the New York Central line and yards, and to the east by the surge basin between the power-plants. Of the many alternatives studied, all but one were properly eliminated because of engineering and topographical problems. And the Exhibit 165 plan was found to be an unreasonable alternative, because of community disruption, substantial delay, and great cost (FPC main brief, pp. 43–46). While respondent slights the natural and technical limitations, it is of course only a great stroke of natural good fortune which makes possible this enormous project—the fact that the Niagara River drops 314 feet in a few miles. Similarly, the reservoir location has been determined mostly by natural conditions and in minor part by the community development in the area. This is not a project in which there is a relatively free choice of locations; the very special character of the geography in the Niagara region dictates the placement of the reservoir.[4]

C. THE LAW GOVERNING THE TAKING OF INDIAN LANDS

Accordingly, respondent's argument on the Niagara Development Act must boil down to its proposition that condemnation of Indian lands—no matter what

[4] The only specific allegation by respondent is the Power Authority's failure to consider raising the dikes of a reservoir covering a smaller area (Brief, p. 49, fn. 29). The Commission has found that raising the dikes to achieve the required storage of 60,000 acre-feet "is technically infeasible and is economically undesirable" (R. 488).

the need for those lands or how great the damage to the authorized project by a failure to include them—can only be based upon "the most plain and unequivocal statutory language", "the most express and unambiguous language of Congress" (Resp. brief, pp. 23, 31–33, 41–42). This is not, and has never been, the governing law.

1. Respondent's purported rule is refuted by one of the very cases which it cites. In *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (C.A. D.C.), certiorari denied, 360 U.S. 909, the two statutes involved—authorizing the Allegheny Project and appropriating funds for it—made no mention whatever of the Indian lands. The legislative history indicated Congressional knowledge of the situation but this was precisely the "unexpressed intention", without statutory language, which respondent (Brief, p. 34) believes to be inadequate.[6]

2. Moreover, we have already shown that, under rulings of this Court, Congressional authorization to take Indian lands is established by the objective necessity for such lands to carry out a project specifically authorized by Congress. *Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*,

[6] To the same effect as *Seneca Nation of Indians* v. *Brucker* are *United States* v. *21.250 Acres of Land*, 161 F. Supp. 376 (W.D. N.Y.); *United States* v. *5677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.). *United States* v. *2405.32 Acres of Land, etc.*, 160 F. Supp. 193 (D. S. Dak.), cited by respondent (Brief, p. 33, fn. 16), is to the contrary. Aside from its minority position, the latter case did not involve the instant problem, where the taking of Indian lands is shown to be indispensable for a specific project authorized by Congress.

160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118 (FPC main brief, pp. 52–54). Respondent attempts to distinguish *Henkel* on the ground that the transfer by the Indians was voluntary (Resp. brief, pp. 46–47) but, upon its own theory that *any* alienation must be federally-confirmed (Resp. brief, pp. 28–30, 59–60), that would not remove the necessity for Congressional approval and the significant factor is that the Court found such approval in the general terms of the Reclamation Act and the necessity to use the lands, not in "express" or "unequivocal" reference to Indian lands.

Respondent also asserts that the statutes in *Spalding* and *Missouri, Kansas & Texas Ry.* granted specifically defined territory, as compared to the alleged general objective of the Niagara Development Act (Brief, p. 47). The reverse is true. In *Spalding*, Congress granted to the State of Michigan a canal route through public lands according to "the line of the survey heretofore made for that purpose, *or such other route between the waters above and below said falls* [St. Mary's Falls], *as under the approval of the Secretary of War may be selected*" 10 Stat. 35; 160 U.S. at 406 (emphasis added). The grant in *Missouri, Kansas & Texas Ry.* was for a railroad line from Fort Riley, Kansas, to the state line with a view to an extension to Fort Smith, Arkansas, along with grants of nearby sections of land to be definitely selected "when the line of said road is definitely lo-

cated". 14 Stat. 289; 152 U.S. at 114.[6] Despite the contingent nature of these grants, and the failure to mention Indian lands, the grantees were held authorized to condemn Indian lands essential for the execution of the canal and railroad.

In the present case, when Congress authorized the Niagara Project, its location had been developed and mapped with near certainty—far greater than in the two cases we have just discussed—and the power to condemn all indispensable lands, including Indian lands, was granted *a fortiori*.[7]

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[6] An example of recent legislation on the basis of contingent plans is that of the Rivers and Harbors Act of 1945, 59 Stat. 10, 17, authorizing a development on the Alabama-Coosa River "substantially in accordance with the plans being prepared by the Chief of Engineers with such modifications thereof from time to time as in the discretion of the Secretary of War and the Chief of Engineers may be advisable for the purpose of increasing the development of hydroelectric power."

[7] Respondent also states, at this part of its brief, that the grants in *Spalding* and *Missouri, Kansas & Texas Ry.* involved territory held in the name of the United States (Br., p. 47), although elsewhere it asserts (Brief, pp. 26, 68–69) that the Congressional consent needed for taking of Indian lands is the same, regardless of the Government's interest. We have urged that a lesser authorization would suffice in this case because no treaty rights are involved (FPC main brief, pp. 55–57); and, as a matter of construction of the Federal Power Act, we have urged a distinction between Indian lands in which the United States has a real property interest, and others. But certainly respondent's fee title does not make it more immune from federal condemnation than Indian groups the title to whose land rests in the United States.

Respondent's two further grounds for distinguishing *Spalding* (Brief, p. 47, fn. 26) are without basis. First, it says, the lands in *Spalding* were essential to the grant; but the same is true here. Second, the alleged notice to Congress that the

3. Nor may the power to condemn Tuscarora lands needed for the Niagara Project be defeated by the various maxims cited by respondent. Thus, the proposition that general acts do not apply to Indians without a clearly manifest intention to include them has been utilized, in the cases cited by respondent (Resp. brief, pp. 32–33, 41–42), to relieve Indians from the burdens of general immigration and tax laws as well as to withhold the right to vote from them. It has no bearing, however, upon a specific statute dealing with a specific development in a specific area, the achievement of which will be seriously thwarted unless some Indian lands are included.

Second, respondent says that laws affecting Indians are to be liberally construed for their benefit and protection (Resp. brief, pp. 35–36, 42). Actually, as formulated in the cases cited, this canon directs liberal construction of treaties or statutory grants *to* Indians, not of all laws affecting them. The immediate answer, then, to application of that rule to this case is that the Tuscarora lands were never involved in a treaty or grant but were purchased by the tribe with its own funds (FPC main brief, pp. 13–15, 55).

In addition, the rule of liberal construction for Indians must be balanced against—and may well be out-

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canal would run through Indian lands was shown only by an unrelated statute passed two years before the canal grant, in which Congress referred to the Indian lands, 160 U.S. at 406. In this case, as we have seen, there is similar notice from statutes dealing with civil and criminal jurisdiction over the Tuscaroras and other New York Indians, passed in 1948 and 1950. See FPC main brief, p. 55, fn. 40.

weighed by—other significant policies. Thus, treaty rights in land are not acquired by Indians without express Congressional authorization. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 278–279; *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 177, 179. So also, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104–106, this Court held that the Secretary of Interior did not have the power to grant Indians permanent rights in the Alaskan fisheries in the absence of unambiguous legislation. The reason was that the United States must be assumed to retain the "complete power to protect, improve and regulate for the good of all our people these unrivalled sea fisheries with their wealth of food".

Hynes v. *Grimes Packing Co.*, also disposes of respondent's third maxim, *i.e.*, that grants of public property or the relinquishment of public interests are to be construed strictly in favor of the Government. For it is apparent that an Indian reservation interest or use is not equivalent to the public Governmental interest intended to be protected by this rule. Indeed, to paraphrase *Hynes*, the potentiality of a "wealth" of electrical energy from Niagara is an "unrivalled" national resource and every presumption should be taken in favor of the Government's power to develop it fully "for the good of all our people." In all fairness, it is difficult to see any impairment of public interest, or undue burden upon the relatively few members of respondent Nation, in the payment of full just compensation for some of its lands, particularly since the acquisition of alternative lands would serve

all of the purposes to which the lands in suit are devoted. On the other hand, exclusion of respondent's lands would gravely diminish the electric power available, to all the people of the area, from the great Niagara Project.

II

THE FEDERAL POWER ACT'S "RESERVATION" PROVISO AND THE TUSCARORA LANDS

On this aspect of the case, our position is that the term "reservation" has a special meaning in the Federal Power Act, comprehending only lands owned in fee by the United States or in which the United States has some real property interest. This is supported by the Act's definition of "reservation", its jurisdictional bases for licensing projects, its compensation provisions, and its history. Since the Tuscarora lands are owned by respondent in fee simple, condemnation of them or their inclusion in the Niagara Project is not limited by the Power Act's proviso covering inclusion of "reservations" (FPC main brief, pp. 58–73).[8]

[8] Respondent does not expressly dispute that it holds the land needed for the reservoir in fee simple and that the United States has no real property interest in it. See Resp. brief, pp. 55–56. Nevertheless, in its statement of facts (Brief, p. 6 and fn. 3), respondent states that the Secretary of War first acquired the land "in trust" and suggests that the fee simple transfer to the Nation was an "historical accident". Actually, the purchase of the lands was upon the initiative of the Nation itself (Resp. brief, p. 5). The Secretary of War did not receive the lands to hold generally in trust, only as temporary escrowee "in Trust to and for the only proper use, Benefit and Behalf of them the said Tuscorora Nation of Indians and their Assigns forever, and in Trust that he, the said Henry Dear-

A. Respondent seeks to defeat this construction of the Power Act primarily by posing certain alleged untoward consequences. First, it states that, if the Tuscarora lands are not included within the "reservation" proviso of Section 4(e), then the Power Act does not contain any authorization to take those lands. To the contrary, the rule is that the specification by Congress of a special condition for taking certain Indian lands shows Congressional intent that use of Indian lands generally are included in the grant. *Kindred* v. *Union Pacific R.R. Co.*, 225 U.S. 582, 596. Those Indian lands not covered by the 4(e) proviso and needed for a licensed development (like respondent's) may be taken under the general condemnation power in Section 21 of the Power Act, as is the case with other needed lands. The Power Act, in short, contains within its four corners sufficient Congressional authorization to take and use all types of Indian land.

B. Second, respondent asserts that our construction of the Power Act "is contrary to 175 years of dealings between the Federal Government and Indian tribes, which experience forms the legal background of the Federal Power Act" (Resp. brief, p. 68). Aside from the admitted fact that the term "reservation" has been used in different senses by Congress (FPC main brief, pp. 71–72; Resp. brief, p. 68, fn. 47), there is not one jot of evidence that the practices of Indian law were the context in which the Power

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born and his Heirs grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscorora Nation of Indians shall at any time hereafter direct and appoint. * * *" (R. Ex. 193). See FPC main brief, pp. 13–15.

Act was drafted and written. As we have shown in our main brief, Congress was explicitly dealing with the problems of power development on navigable streams (under the interstate and foreign commerce power) and in the public domain and federal lands (under the Property Clause) (FPC main brief, pp. 65–68).

Respondent has sought to supply the missing link by the conjecture that Section 4(e) of the Power Act was adapted from the Acts of February 15, 1901, and March 4, 1911, dealing with rights-of-way over Indian and other reservations, and that the latter acts had been interpreted to include Indian reservations regardless of the Government's real property interest (Resp. brief, pp. 65–66). Neither of these premises is warranted. A search of the legislative history of the Power Act discloses no indication that the 1901 and 1911 statutes were relied upon. The earliest bill leading to the Power Act which dealt with reservations was written from an entirely different point of view, and showed most clearly that the power over federal property was being exercised. It would have authorized power developments upon "any part of the lands and other property of the United States (including Alaska), reserved or unreserved, including lands in national forests, national monuments, military and other reservations, not including national parks." H.R. 16673, 63d Cong., quoted in H. Rept. 842, 63d Cong., 2d Sess., pp. 1–2. Significantly this bill, in 1914, already contained a version of the 4(e) proviso in language similar to the Federal Power Act,

but quite different from the 1901 and 1911 acts upon which respondent relies.[9]

The lone opinion of the Solicitor of the Interior Department dealing with the term "reservation" in the 1901 and 1911 Acts was written and published in the 1940's (58 Interior Decisions 85, 99)—long after Section 4(e) took shape—and could not have been known to or adopted by Congress in the Federal Power Act of 1920. Moreover, its correctness is open to serious doubt. While the opinion failed to cite any legislative history, the committee reports for the 1911 Act explicity stated that its object was to provide rights of way "across the public domain and national forests"—which would seem to exclude an Indian reservation held by a tribe in fee simple. S. Rept. 967, 61st Cong., 3d Sess., p. 1; H. Rept. 2177, 61st Cong., 3d Sess., p. 1. And the Solicitor's companion view that the term "reservation" in those Acts also included allotted lands (58 Interior Decisions 85 at 99–100) was expressly overruled in *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206.[10]

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[9] The form of the 4(e) proviso in H.R. 16673 was as follows: "* * * *Provided*, That such leases shall be given within or through any of said national forests, military or other reservations only upon a finding by the chief officer of the department under whose supervision such forest, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired * * *". H. Rept. 842, p. 2. Compare Resp. brief, p. 65.

[10] Moreover, the Solicitor's conclusion relied upon by respondent was essentially dictum, since he had already pointed out that a provision of another act specifically authorized rights-of-way through any Indian lands for a general tele-

C. Turning to respondent's reliance upon the language of the Power Act, it urges that Section 3(2) (defining "reservations") sets forth four wholly distinct categories of land and that the phrase "other lands and interests in lands owned by the United States" does not modify or bear any relation to the terms immediately preceding—"national forests, tribal lands embraced within Indian reservations, military reservations" (Brief, pp. 63–64). This is refuted, we believe, by the plain meaning of "other", by the dominant context of federal ownership throughout Section 3(2), and by the legislative history of the definition (FPC main brief, pp. 59–62).[11] And as we have also shown, the federal guardianship is not an interest in lands within these provisions (Resp. brief, pp. 69–70; FPC main brief, pp. 63–64).

Respondent (Brief, p. 74) incorrectly states that Section 10(e) of the Power Act, providing for annual charges, distinguishes "between Federal 'lands or

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phone and telegraph business. 58 Interior Decisions at 98–99. In discussing the Acts of February 15, 1901, and March 4, 1911, he stated that their authority would be needed only in the event telephone and telegraph lines were sought for private use, as distinguished from general public service. 58 Interior Decisions at 99.

[11] That Congress originally included national monuments and national parks in the statutory definition, and then removed them, does not support respondent's view (Brief, p. 64) but rather militates against it. If the categories in 3(2) were wholly separate, Congress might have thought it sufficient to achieve the objective of eliminating jurisdiction over parks and monuments by eliminating those words from the definition section. Instead, Congress in 1921 added a special proviso to Section 4(e) to that end (41 Stat. 1353) and did not amend the definition until 1935 (49 Stat. 838).

other property' * * * and 'tribal lands embraced within Indian reservations' ". On the contrary, the proviso in Section 10(e) containing a special condition for "tribal lands" clearly modifies the general provision at the beginning of Section 10(e) dealing with compensation for the use of Government "lands or other property". This too demonstrates that the "tribal lands" given special treatment in Section 10 (e), and in the 4(e) proviso, are those in which the United States has a real property interest (FPC main brief, pp. 68–71).[12]

D. Finally, respondent's extreme position is that our construction of the Power Act would exclude "the bulk of all Indian reservations in the United States" from the coverage of the licensing provisions of Section 4 of the Power Act. Its reasoning is that, because the Indian right of occupancy to reservations on the public domain is generally compensable, such reservations cannot be freely disposed of by the United

[12] Among its conditions, Section 10(e) provides that, if an Indian tribe has organized under the Wheeler-Howard Act, annual charges for use of tribal lands in its reservation are subject to its approval. Respondent states that, if the Tuscarora Nation had so organized, it would be able to prevent any taking of its lands by refusing to approve the annual charge under Section 10(e) (Resp. brief, p. 74, fn. 54). In the first place, respondent's lands would still not constitute a reservation covered by these provisions. In any event, it is significant that Congress in 1920 defeated an amendment to Section 4(e) which would have given a veto power to Indians upon treaty reservations. 59 Cong. Rec. 1534, 1535–1536, 1564–1570; H. Rept. 910, 66th Cong., 2d sess., p. 8. Certainly, the power to approve the reasonableness of rents may not now be turned into the rejected veto—and for a non-treaty reservation.

States; hence, it argues, they do not constitute "Property belonging to the United States" (Const., Article IV, Section 3) and would not be included if the Power Act's jurisdiction to issue licenses upon "reservations" comes only from the Property Clause (Resp. brief, pp. 70–74).

The short answer to this theory is that respondent has confused the constitutional sources of Congressional power with the wholly separate constitutional requirement of just compensation for private property taken for public use. That the Fifth Amendment requires compensation does not shed any light upon the source of the power being exercised when Congress determines upon a public use, and authorizes that it be carried out through the federal power of eminent domain. Cf. *United States* v. *Carmack*, 329 U.S. 230, 236–239; *Kohl* v. *United States*, 91 U.S. 367, 371–374.

Congress may, for example, determine upon a river development under its power to regulate commerce. If an individual had earlier been granted certain vested rights in the area, they may not be taken without just compensation, but the power of Congress to terminate the grant and embark upon its own use is undoubted. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 334–345; cf. *James* v. *Campbell*, 104 U.S. 356, 358 (taking of patent rights). Similarly, Congress has the constitutional power, under Article IV, Section 3, to develop the resources upon federal lands and to condition the use of federal property. The Fifth Amendment would protect any private vested rights in that federal property, be they

vested Indian right of occupancy, licenses under the Power Act, franchises, leases or other contractual obligations. But the status of the remaining federal real property rights as federal property is not altered by the existence of such private vested rights and the power of Congress to dispose of the federal property rights under the Property Clause is not affected—except that just compensation will have to be paid for the private rights necessarily disposed of along with the federal property.[13]

The unsoundness of respondent's approach is demonstrated by the consequences for the analogous non-Indian situations. We cannot believe that, after a lease or a power license is issued on the public domain, Congress must look beyond Article IV, Section 3, to the commerce or other powers, in order to condemn such a grant so that it may be disposed of along with the remaining public property rights. Likewise, Indian reservations on the public domain, although compensable, are subject to the power of Congress to devote the whole of the public domain to other uses.

Respondent states that the Power Act's licensing of projects upon Indian reservations is simply based upon the power to regulate commerce with Indian

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[13] Respondent has signally failed in its attempt to distinguish the cases cited in our main brief, p. 65, fn. 47, which show that ownership by the United States of legal or trust title makes an Indian reservation federal property under Article IV, Section 3 (Resp. brief, p. 73, fn. 52).

tribes (not adverted to by Congress), and, therefore, all Indian lands are covered, regardless of the Government's property interest. We have shown, however, that this theory is controverted by the Act's legislative history (FPC main brief, pp. 66–68). Moreover, as respondent points out (Brief, pp. 75–76), the federal guardianship power over Indians is to be exercised to promote their own welfare; indeed, a guardianship use of Indian lands does not lead to payment of compensation to the Indians. In contrast, under the Power Act, developments are contemplated which ordinarily will not be primarily for the benefit of the Indians, and full compensation is to be paid. It is obviously more consonant with the expressed intent of Congress in the Power Act to consider condemnation under that Act as an exercise of the general powers over commerce and over the federal domain, than to view it as an exercise of Congressional guardianship powers.

Accordingly, just as Indian lands not owned by the Government do not constitute a "reservation" for Power Act licensing purposes, so condemnation of those lands does not require the special treatment afforded "reservations" in Section 4(e) of that Act.

CONCLUSION

For the foregoing reasons, and those stated in our main brief, we respectfully submit that the judgment

below should be reversed and the Commission's issuance of the license should be affirmed.

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Supreme Court of the United States

OCTOBER TERM 1959

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

I

Respondent's Concession That if a § 4(e) Finding Is Unnecessary the Judgment of the Second Circuit Court of Appeals Is Binding Narrows the Issues on This Appeal But Such Concession Is Not as Extensive as It Should Be Because the Second Circuit Validly Decided All the Issues Later Presented to the District of Columbia Circuit in the Review Proceeding and the Latter Court Should Have Honored the Prior Judgment on Those Issues.

Respondent's brief in footnote 60 (p. 84) states:

> "The most that can be said of petitioner's res judicata argument in this case is that, if the Tuscarora Reservation were not protected by Section 4(e), then the Second Circuit decision to the effect that respondent's property may be condemned under Section 21 would be binding. The court below, however, did not necessarily disagree with this conclusion. R. 430-31; compare footnote 50, *supra*. Furthermore, the point is of little practical value to the Power

Authority where, as here, Section 4(e) prevents the inclusion of Tuscarora lands under the license.'"

Since it is so palpably clear that respondent's land needed for the power project is not part of the public lands and reservations of the United States within the meaning of § 4(e) of the Power Act and that § 4(e) was superseded by the 1957 Act as far as the issuance of a Niagara license is concerned, respondent's concession should dispose of this appeal.

However, since respondent's brief (pp. 80-84) has misinterpreted our argument that it should not be allowed to relitigate issues decided by the Second Circuit and since its concession does not go as far as it should, we wish to call the Court's attention to the facts which follow.*

Of the 1,383 acres of respondent's land needed in connection with the project, 1,262 are needed for reservoir purposes, 35 for a road around the reservoir and 86 for transmission lines. The only part included within the license by the May 5, 1958 order of the Commission was the part needed for the reservoir.** The part needed for the road would probably be included in the license later but the part used for these transmission lines definitely would not. These lines were built to replace other lines owned by the Niagara Mohawk Power Corporation and connect with other Niagara Mohawk lines crossing the reservation. They are not the type of lines which § 3(11) of the Power Act provides shall be part of the project.

In the Second Circuit action it was determined that the 1957 Niagara Redevelopment Act gave the Authority a

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* We put no label on our argument such as *res judicata*, collateral estoppel or estoppel by judgment.

** In the Authority's petition (and supplement to petition) for rehearing on the Commission's February 2, 1959 order finding that use of Tuscarora land would interfere and be inconsistent with the purpose for which the reservation was created or acquired, we erroneously stated that the land needed for the transmission lines and road were included in the license. However, an examination of the Exhibit J which the May 5, 1958 order approved shows that it did not include them (R. 497, 502, 416-418).

right to condemn respondent's land for transmission line purposes, road purposes and reservoir purposes despite the fact that respondent made the same 4(e) argument in the Second Circuit as it later made in the District of Columbia Circuit.*

On the other hand, the later judgment of the District of Columbia Circuit was concerned only with the taking of respondent's land for reservoir purposes. It did not purport to overrule the Second Circuit judgment as far as it related to land needed for transmission lines and roads, none of which is within the licensed project area (R. 285-287, 532-533).

Neither the Commission's January 30, 1958 order granting a superseding license nor its March 21 order denying respondent's application for rehearing included any of respondent's land in the license (R. 400-401, 404, 412-413). In making both orders the Commission in effect told the Authority it would order such inclusion at a later date if the courts held that the Authority had a legal right to use respondent's land. Immediately after the rehearing application was denied, the Authority took steps to precipitate a legal determination of its right to take respondent's land.

At that point respondent was in a position, if it desired to do so, to file a petition for review of the January 30 order either with the Court of Appeals for the District of Columbia Circuit or the Court of Appeals for the Second Circuit and to ask for a stay (§ 313(b) of the Act). Assuming that under § 313(b) as then in force the court would have had jurdisdiction to grant a stay prior to the filing of the transcript, the Authority—contrary to the statement in respondent's brief (p. 81)—as licensee would have been bound by the stay and of course would have honored

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* The opinion of the Second Circuit Court of Appeals indicates that the Court considered this argument and rejected it. The Court stated that under § 4(e), provided a finding were made, a licensee could use *even* lands belonging to the United States. (*Tuscarora Nation of Indians* v. *Power Authority et al.*, 257 F. 2d 855 (2d Cir. 1958) *reh. den.* 257 F. 2d 895, *cert. den.* 358 U. S. 841 (1958) *reh. den.* 360 U. S. 923 (1959).)

it without question even though it was not a party to the review proceedings. The Authority on the other hand would have been able to ask the court to condition the stay upon a speedy resolution of the review proceeding.*

At that point the following priorities governed the Authority's need for the land:

(a) The making of surveys;
(b) The building of transmission lines;
(c) The diversion of creeks;
(d) The building of the reservoir.

The Authority promptly commenced eminent domain proceedings and attempted to survey respondent's land on the basis of a provision of law (N. Y. Pub. Auth. Law § 1005(7)) allowing the making of surveys and investigations in connection with power projects.

Instead of filing a petition to review the January 30 order, respondent obtained a stay from the United States District Court for the Southern District of New York and brought a declaratory judgment and injunction action in that court.**

As stated in our main brief (pp. 11-12), respondent waited until almost the very end of the sixty day period

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* The Authority would not have challenged the court's power to grant a stay if the court thought respondent aggrieved. What the Authority wanted was an expeditious determination of its legal rights.

** Respondent's brief (p. 81, footnote 58), maintains that respondent had no other federal remedy with which to protect its rights. Even though this statement is based on wrong reasons it definitely establishes that the courts of the Second Circuit had jurisdiction to decide the issues presented to them by respondent. Having such jurisdiction the declaratory judgment which resulted from the action there is binding. Even though a statutory review proceeding is provided, if it does not constitute a remedy by which as a practical matter all of a party's rights may be protected, he is entitled to invoke equity jurisdiction. Davis, *Administrative Law Treatise*, Vol. 3 § 23.04, p. 309; *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, 60 (1938); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1948).

allowed by law to bring a review proceeding and then brought it in the District of Columbia Circuit rather than in the Second Circuit where the declaratory judgment action was pending. In addition, it procured an order from the District of Columbia Circuit setting November 15 as the last day for filing its reply brief in the case and did so before the Authority had an opportunity to intervene.

We do not argue that the Second Circuit judgment decided the validity of the Authority's license. There is no question but that the Court in which the review proceeding was brought is the only court which could do so. The District of Columbia Circuit Court of Appeals obtained exclusive jurisdiction to review the January 30 licensing order upon the filing of the Commission's Transcript of Record after judgment was entered in the District Court action. The main significance of "exclusive jurisdiction" is that if more than one petition for review is filed and filed in more than one court, the court in which the transcript is first filed obtains exclusive jurisdiction to review the whole order. *Pacific Gas and Electric Co.* v. *Federal Power Commission*, 253 F. 2d 536, 540-541 (9th Cir. 1958). For example, the Town of Lewiston which participated in the hearings before the Commission and objected to the location of the reservoir could very well have filed a petition for review of the January 30 order in the Second Circuit.*

We do contend that the Court of Appeals for the District of Columbia Circuit in determining whether or not to affirm, modify or set aside the January 30 order in whole or in part should have honored the judgment of the Second

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* The Commission's May 5 order, which was the only order which included respondent's land in the project, by its terms was to be final unless rehearing were asked within thirty days under § 313(a). Lewiston could have asked rehearing and then sought court review of that order and surely it could not be said that it had forfeited its rights by failing to take similar action with respect to the January 30 order.

Circuit with respect to the issues which were common to the action in the Second Circuit and the review proceeding in the District of Columbia Circuit.*

The District of Columbia Circuit Court of Appeals should not have allowed respondent to play one court against another and to relitigate issues which the Second Circuit decided at respondent's behest and of which respondent alleged in its complaint and stated in a written brief the Second Circuit had jurisdiction.

Respondent by now conceding that if a finding is not required under § 4(e) of the Power Act the Second Circuit judgment is binding says in effect that only the District of Columbia Circuit could determine the necessity of a § 4(e) finding but that the Second Circuit had jurisdiction to decide all other issues.

The Second Circuit determined that by the 1957 Act, Congress authorized the taking of respondent's land for the Niagara project and necessarily determined that § 4(e) of the Power Act was no bar. Thus the Second Circuit determined every issue raised by respondent and the grounds upon which it made the determination are not material. *Angel* v. *Bullington*, 330 U. S. 183, 190 (1947); *Deposit Bank* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 510-11 (1903); *American Express Company* v. *Mullen*, 212 U. S. 311 (1908).

Even if the Federal Power Commission would not have been bound by the Second Circuit judgment in the event it had been favorable to respondent, respondent having chosen its forum ought not to be allowed to relitigate the same issues in a second United States court.

Tacoma v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958), does not suggest a different result.

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* The Second Circuit Court of Appeals affirmed as modified the district court judgment which was entered before the District of Columbia Circuit got exclusive jurisdiction of the review proceeding by the filing of the Commission's transcript of record.

This court in the *Tacoma* case held that a party to a Federal Power Commission license proceeding whose contentions are overruled by the Commission "may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had 'exclusive jurisdiction' of the proceeding and whose judgment therein as declared by Congress 'shall be final', subject to review by this Court upon certiorari or certification."

In our case there was at least grave doubt that respondent was aggrieved by the January 30 order of the Commission.* Respondent took advantage of the procedure provided by the Declaratory Judgment Act (62 Stat. 694, amended 63 Stat. 964, Title 28 U. S. C. § 2201) and obtained from a court of competent jurisdiction a binding determination of issues upon which the Commission in its January 30 and March 21 orders had refused to rule and also of the § 4(e) issue upon which the Commission did rule.

It remained for the court in which a review proceeding was later brought to determine whether or not to affirm, modify or set aside the January 30 order for any reason but in making such determination that court should not have allowed litigation *de novo* of issues already decided.

The *Tacoma* decision was handed down on June 23, 1958 and respondent's appeal in the declaratory judgment action was argued before the Second Circuit in July. The Power Authority cited the *Tacoma* case to that court for the proposition that § 21 of the Power Act is so broad that a state's property can be condemned by a Federal Power Commission licensee which is a creature of the state against state opposition. Respondent made no suggestion to the court that the *Tacoma* case established the proposition that it lacked power to decide the issues before it.

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* Contrary to the statement in respondent's brief (p. 81) we do seriously contend that respondent was not aggrieved by the January 30 order. See Main Brief, pp. 89, 92.

II.

Contrary to Respondent's Contention the Term "Public Lands and Reservations of the United States" as Used in the Public Land Laws Has Never Been Held to Apply to Land Such as Is Here Involved and Since Respondent Concedes That the Term Has a Similar Meaning in §4(e) of the Power Act It Clearly Does Not Apply to Respondent's Land.

In an effort to show that the term, "public lands and reservations of the United States" as used in §4(e) of the Power Act includes respondent's land needed for the power project even though the United States owns no interest in the land, respondent's brief (p. 65) points out that the term "public lands and reservations of the United States" is also used in the Public Land Laws (Title 43, United States Code) in §§959 and 961 (Act of February 15, 1901, 31 Stat. 790, and Act of March 4, 1911, 36 Stat. 1235), which authorize the granting of rights of way for power and other utility purposes.*

The Authority's Main Brief (pp. 49 and 51) makes the same observation and points out that §§959 and 961 of Title 43 have never been considered to apply to Indian reservation land in New York State and that power lines have been built on respondent's reservation under state law rather than under the authority of those statutes. (See Main Brief, pp. 27-28.)

Respondent on the other hand by citing (p. 66) an opinion of Felix Cohen as Acting Solicitor of the Interior Department in 1942 (58 Decisions of the Interior Dept. 85, 1942) seeks to establish that the Public Land Laws provisions apply to land owned by Indians in fee and that therefore §4(e) similarly applies.

The opinion cited was written in 1942 although in its first paragraph there is an admission that the question which it purported to answer had been moot since 1940.

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* The term is also used in other sections of the Public Land Laws. (See Main Brief, p. 49.)

Although the part of a paragraph of the opinion quoted in respondent's brief gives the impression that the land in question was owned in fee by an Indian Nation it had in fact been allotted in severalty.*

The succeeding paragraph of the opinion—none of which respondent's brief quotes—discussed the fact that the land in question had been allotted and that it was the Department of Interior's position that §§ 959 and 961 of Title 43 applied to it but that the issue was then being litigated.

Six months after the opinion was delivered this court in *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943), overruled the Department and held that permission of the Secretary of Interior was not necessary to the

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* The land of Five Civilized Tribes of Oklahoma unlike the land here involved was once part of the federal public domain. It was conveyed to the Indians by patents subject to a reversionary interest in the United States (7 Stat. 478; 9 Stat. 871; 14 Stat. 799). Its use for the common benefit contemplated by the patents did not work out (*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 447-451 (1899)). This led to legislation for the distribution of tribal property by allotment of the lands in severalty (27 Stat. 645; 29 Stat. 321; *Heckman* v. *U. S.*, 224 U. S. 413, 431-2 (1911)). Restrictions on alienation were included in the allotment agreements but provisions were made for condemnation of lands necessary for public improvements "regardless of tribal lines" (30 Stat. 495, 567; 31 Stat. 861; 32 Stat. 43, 500, 716; 34 Stat. 137). Congress has passed many special acts governing the Five Civilized Tribes, *e.g.* creation of the office of Superintendent (25 U. S. C. §§ 25, 25(a)); encumbrances on lands allotted (25 U. S. C. § 86); payments to members from funds of the tribes (25 U. S. C. § 120); expending tribal funds (25 U. S. C. § 124); deposit of funds from sales of lands and property (25 U. S. C. §§ 156, 162); access to records (25 U. S. C. § 199); laws applicable to lands of full blooded members (25 U. S. C. § 355); allowances of claims of restricted allottees (25 U. S. C. § 356); determination of heirship (25 U. S. C. §§ 375, 375(a) (b) (c)); lease of restricted lands (25 U. S. C. 393(a)); the sale of restricted lands (25 U. S. C. § 409(a)); reservation of minerals in sale of tribal lands (25 U. S. C. § 414); promotion of welfare (25 U. S. C. §§ 501-510).

building of power lines over allotted land even though the Government held title in trust to prevent improvident alienation.

This Court pointed out that if a telephone line were built on a reservation of the United States under § 959, the licensee was required to consent to having the rates it charged the government fixed by the Postmaster General. This Court didn't "believe that Congress ever intended to exact such conditions as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee." (318 U. S. at p. 214)

It said that "H. R. Rep. No. 1850, 56th Cong. 1st Sess. indicates that the title of the Act, referring to public lands, was advisedly chosen." (318 U. S. at p. 212). The title of the Act was "An Act Relating to rights of way through certain parks, reservations and other public lands."

Cohen's opinion and the opinion of this Court in the *Oklahoma Gas* case read together show clearly that the term "public lands and reservations of the United States" includes only lands in which the United States owns a property interest.

Respondent's land, unlike that with which Cohen in his opinion and this Court in the *Oklahoma Gas* case were concerned, was never part of the public domain of the United States.

If the Secretary of Interior believed that respondent's land were part of the public lands and reservations of the United States he would undoubtedly long since have required the Niagara Mohawk Power Corporation to obtain a permit from him for its lines across the reservation.

The public lands and reservations referred to in § 4(e) of the Power Act are the same type of public lands and reservations covered by the Public Land Laws. Respondent's brief (Footnote 42, p. 63) erroneously seeks to give the

impression that the briefs of the Government and the Authority contend that § 3(2) of the Power Act in its definition of "reservations" includes only such land owned by the United States as the Public Land Laws reserve from private appropriation and disposal. This of course is not true. Government land has been reserved by treaty, statute and executive order and when so reserved is not subject to "*private appropriation and disposal* under the public land laws" (§ 3(2); see also § 3(1)).

Respondent's statement (brief, pp. 63-64) that under petitioner's interpretation of the term "reservation" the bulk of the Indian land in the United States would be excluded, is also untrue. It points out that the Pueblo Indians own in fee some 700,000 acres of land but neglects to compare this with the 52,000,000 acres of Indian land over which the Government through the Bureau of Indian Affairs exercises trust responsibility (1958 Annual Report of the Secretary of Interior, p. xxx). Pueblo land of course is in a category all by itself. (See Authority's Main Brief, pp. 55-56). And as pointed out by Mr. Justice Van Devanter in *United States* v. *Creek Nation*, 295 U. S. 103, 109 (1934), fee title in an Indian tribe is rare and is different from "the usual right of occupancy with the fee in the United States".

III

Respondent's Brief Contains Misstatements about The Legislative History of The 1957 Act and The Necessity of Using Respondent's Land for The Project.

1. Respondent's brief in notes 23 and 24 (p. 44) erroneously states that an Army engineer gave uncontradicted testimony at the House Public Works Committee hearings in 1956 to the effect that Niagara Mohawk Power Corporation owned all the land needed for the project. That engineer merely testified that Niagara Mohawk "gen-

erally" owned all the land needed for a smaller project. Contrary to respondent's brief the Power Authority witness who immediately succeeded him made it clear that Niagara Mohawk did not own all necessary land and testified that the Authority had power to condemn all the land needed for the project regardless of ownership. (R. 256-261, 289-290)

2. Respondent's brief in note 24 erroneously seeks to give the impression that the House Report on the bill which became the Niagara Redevelopment Act stated the project would have a reservoir of 22,000 acre feet and the Senate Report a reservoir of 30,000 acre feet. Both Reports made it clear that a larger reservoir would have to be built. (H. Rep. No. 862, 85th Cong. 1st Sess. pp. 5-7; S. Rep. No. 539, *id* pp. 5-6; R. 388). Contrary to the suggestion of the brief (p. 43) the exhibits presented in the 1955, 1956 and 1957 hearings of the House and Senate Public Works Committees, taken together, show clearly that an enlargement of the reservoir necessarily would take in land which is included in respondent's reservation.

3. Respondent's brief (p. 52) states that a Power Authority witness refused to testify that any member of Congress ever read Exhibits 191 and 218 but neglects to point out that the same witness at page 271 of the Record testified that every Senator who attended the hearing of the Senate Public Works Committee looked at Exhibit 191. A comparison of Exhibit 218 and the Congressional Record shows that several members read from Exhibit 218 in the House and Senate debates. (104 Cong. Rec. 13195-97, 13205-06, 14443-44)

4. Respondent's brief (p. 48) wrongly states that its lands were not needed in 1957 when the Niagara Redevelopment Act was passed. It says that the Authority's General Manager testified that the boundaries of the reservoir had not been determined in 1957. What the witness said was that the "*exact*" boundaries (R. 270) and the "*complete*" acreage (R. 274) were not known, although the general location had been determined. As a result of

the Schoellkopf disaster and the fact that a project large enough to use all Niagara water was to be built the Authority's Resident Engineer studied possible locations in the fall of 1956 (R. 109) and on the basis of that study it was determined by January, 1957 that the reservoir had to be partly on Tuscarora land (Ex. R. 35). Exhibit 191 published in January included such land in the reservoir.

5. Contrary to respondent's contention (p. 49), nothing which has happened since 1957 is responsible for the need for Tuscarora land. It has always been needed for a reservoir big enough for a project capable of using all Niagara water available by international agreement. Even with the higher dikes referred to by respondent (note 29) some Tuscarora land would be needed for a reservoir with 60,000 acre foot capacity although with higher dikes less Indian land would be necessary. What respondent's brief says about higher dikes in note 29 is not borne out by the record cited and is untrue (R. 3-11).

6. Respondent's statement (p. 51, note 31) that the Tuscarora did not "conclude" in 1957 that the Authority intended to appropriate their lands is untrue. Not only was a map showing the reservoir partly on Tuscarora land distributed to them but they were directly informed in January and February, 1957 that part of their land was required (Ex. R. 45, 46).

IV

Authorities Cited By Respondent Do Not Show That Specific Congressional Consent Is Necessary For The Taking Of Respondent's Land.

Respondent's brief repeatedly (pp. 17, 32, 33, 42, 55) cites *Elk* v. *Wilkins*, 112 U. S. 94 (1884) as authority for its contention that general statutes do not apply to Indians "unless so expressed as to clearly manifest an intention to include them".

Elk v. *Wilkins*, was, of course, a post Civil War case which held that the words in the 14th Amendment "all persons born . . . in the United States and subject to the jurisdiction thereof" did not include Indians. It denied an Indian emancipated from his tribe and living in the City of Omaha the right to vote. Congress took less than three years to overrule the result in Elk's case and by Act of February 8, 1887 (24 Stat. 388) gave Indians in his circumstances the right to vote. The general principle enunciated in the case and relied on by respondent has been overruled in many subsequent cases. *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943); *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418 (1935); *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928); *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916); *Becker* v. *Harvey*, 181 U. S. 481 (1901); *Albany* v. *United States*, 152 F. 2d 266 (6th Cir. 1945); *Bailey, et al.* v. *United States*, 47 F. 2d 702 (9th Cir. 1931); *Y-Ta-Tah-Wah* v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900).

Chouteau v. *Commissioner of Internal Revenue*, 38 F. 2d 976 (10th Cir. 1930), cited by respondent (p. 33) was in effect overruled by this Court in *Five Civilized Tribes* v. *Commissioner*, supra. *McCandless* v. *United States*, 25 F. 2d 71 (3rd Cir. 1928) and *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193 (D. C. So. Dak. 1958) also cited at page 33 of the brief both involved the question of whether treaty provisions had been overriden by Congress.

The statutes cited in respondent's brief in Note 17 (p. 34) do not show that property in an Indian reservation cannot be acquired without express Congressional consent. Two of the statutes (Act of May 17, 1957, 71 Stat. 31 and Act of February 28, 1919, 40 Stat. 1206) authorized municipalities to condemn land owned by the United States. Under the Act of May 10, 1926, 44 Stat. 498 a state was permitted to condemn land in which fee title was owned by the United States. The Act of March 7, 1928 (45 Stat. 200, 212-13) was passed to authorize abandonment by the Government

of a project it had started pursuant to the Act of May 10, 1926, 44 Stat. 464 and to enable the Federal Power Commission to license a private power company to construct the project.*

As recently as the building of the St. Lawrence Seaway-Power Project which has just been completed, land in the St. Regis Reservation in New York State was condemned by the Seaway Development Corporation under the most general type of condemnation statute (33 U. S. C. § 984(a)(8); 68 Stat. 94). *St. Lawrence Seaway Development Corporation* v. *88.57 Acres etc.* (Civil Case No. 6642, U. S. D. C. N. D. N. Y. 1957).

V

Respondent's Brief Is In Error With Respect To The Legislative History Of 25 U. S. C. § 233 And In Stating That Committees Of The New York Legislature Interpreted That Statute As Barring New York's Condemnation Of Indian Land.

The Power Authority contends that Congress has tacitly consented to New York's condemning Indian land as it has been doing since the founding of the republic.

Contrary to the statement in respondent's brief (p. 39) the 1957 Niagara Redevelopment Act does not direct that the Commission issue a license pursuant to the Federal Power Act but rather "in conformance with the Rules of Practice and Procedure of the Federal Power Commission".

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* Contrary to an erroneous suggestion on p. 58 of our main brief, 25 U. S. C. § 357 has been construed to allow the condemnation of allotted Indian land under state laws by private companies as well as by states and municipalities (*Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614 (1959)). Nevertheless we were correct in saying that such land can be condemned under § 21 of the Power Act.

Under those Rules (18 C. F. R. 1.5(b)(3); 18 C. F. R. 4.41 (F)) an applicant for a license is required to state how it plans to acquire the use of land needed for a project other than that which it already owns. The Authority in its application alleged that it could condemn all needed land (no public lands or reservations of the United States being involved).*

Since the Commission may license the use of any land which the licensee has a right to condemn New York's right to do so is important and thus an interpretation of 25 U. S. C. § 233 (64 Stat. at 845) is also important. An interpretation of the statute is important for the further reason that respondent argues it has a bearing on the effect of the 1957 Niagara Redevelopment Act.

Contrary to the statements in respondent's brief (pp. 27-31), nothing in the legislative history of 25 U. S. C. § 233 (64 Stat. 845) indicates that the statute was intended to make any substantive change of law or to bar New York from continuing to condemn Indian land.

Respondent's brief (pp. 27-28) quotes from a 1950 Report of the Joint Legislative Committee on Indian Affairs of the New York Legislature which had drafted the legislation and procured its passage. Nothing in that report suggested that the legislation which the Committee had submitted to Congress would affect New York's powers of condemnation.

A report of the Committee put out this year makes reference to litigation between the Tuscarora and the Power Authority and states unequivocally that the Committee did not consider that Congress in enacting § 233 intended to

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* The rules require that the application state whether any public lands or reservations are involved. If there were government land at Niagara in an area needed for the project the 1957 Redevelopment Act would allow its use. Contrary to the statement in respondent's brief (p. 40) the land would not be condemned but compensation to the Government, if any, would be fixed by the Commission under § 10(e) of the Power Act.

interfere with the state's power of eminent domain (Report of September 23, 1959). The report on pages 5-6 says:

> "Those of the Committee who are most familiar with the legislative history of the Civil Jurisdiction Act of 1950 are surprised that there has been deduced from it a Congressional intent to restrict the State's power of eminent domain, which was upheld by a District Court while the legislation was pending. *United States* v. *Cattaraugus County*, 71 F. Supp. 413 (W. D. N. Y., 1947). That specific intent certainly would have been in a direction contrary to the general tendency of the Act. Of course it is the usual function of a proviso to express an exception to the general effect, but it is not usually a source of important affirmative legislation, and it was not so understood in the present instance while the legislation was being considered.
>
> • • •
>
> "Nothing appears in all the history of the legislation to show that the provisos intended anything except to preserve the status in the specified areas. As to what the status was for present purposes it seems sufficient to quote what Senator Butler read into the record on March 9, 1948. He was Chairman of the Committee, a Subcommittee of which was holding a hearing on the bill, and he read from Assistant Commissioner Merritt's testimony in 1929:
>
> > 'I want to say, for the information of the committee, that the jurisdiction of the Federal Government over the Indians of New York is very limited indeed. In fact, our only jurisdiction up there is to carry out the treaty provisions of the Federal Government. Those Indians are practically independent of the Federal Government. We have practically nothing to do with those Indians. They are educated in the local schools. We do not attempt to supervise their lands.'*"
>
> "* Mr. Edgar B. Merritt was Assistant Commissioner of Indian Affairs and testified before a Senate Subcommittee. The quoted testimony appeared originally at page 4865 of a hearing of March 1, 1929. Senator Butler's reading of it is at page 20 on a hearing about the bill now involved."

Respondent's brief (p. 29) suggests that another New York legislative committee—the Special Legislative committee on Revision and Simplification of the Constitution—took the position that § 233 barred New York's condemnation of Indian land. In the first place, the staff report referred to makes no mention whatsoever of eminent domain either by the state or by any other entity. In the second place, the report was never approved by the Committee. The material in the report relating to Indians was written by the same man who wrote the Law Review article cited on page 31 of respondent's brief. Instead of adopting this and the other material contained in the report, all of which was prepared in connection with the possible revision of the State Constitution, the Committee merely submitted it to the legislative leaders and released it to the public. The Chairman in transmitting the report to the leaders and advising that he was making it public, said:

> "The Committee by so doing hopes to stimulate interest and discussion of the simplification problem and of eliciting comments, criticisms and suggestions which may be helpful to the Committee in appraising the report's findings and in otherwise discharging its special mandate on simplification."

There was nothing in the opinion of Assistant Attorney General Van Devanter (Ex. 250) referred to in footnote 13 (p. 31) of respondent's brief to suggest that New York did not have the power of eminent domain over Tuscarora land. What the opinion said—something of which there is no dispute in any quarter—was that 25 U. S. C. § 177 forbids the Tuscarora from leasing their land to private persons and that there is no federal statute which gives the Secretary of Interior or any other federal agency the right to supervise or approve the making of any such leases. He held that statutes allowing the Secretary to do so with respect to Indian land in the West did not apply to New York Indian land.

Conclusion

The judgment under review should be reversed and the court below directed to dismiss the petition for review or to affirm the order of the Commission under review.

Respectfully submitted,

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December 5, 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*.

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

RESPONDENT'S PETITION FOR REHEARING

Respondent, the Tuscarora Indian Nation, prays that the Court grant rehearing of its judgment of March 7, 1960, reversing the decision of the Court of Appeals for the District of Columbia Circuit in the above-entitled case, and, upon rehearing, that the judgment below be affirmed.

REASON FOR GRANTING REHEARING

The Court has ruled that the term "reservations", as used in the Federal Power Act, 16 U.S.C. § 791(a) *et seq.*, includes only "lands and interests in lands owned by the United States." Slip opinion, p. 12. The

fact is that the vast majority of all remaining "tribal lands embraced within Indian reservations" are *not* lands or interests in lands owned by the United States, but rather are lands which belong to the Indians. If permitted to stand, therefore, this Court's holding will debar from the special safeguards of the Act the very tribal property which Congress unquestionably intended to protect.

For convenience of analysis, tribal lands embraced within Indian reservations may be divided into three classes:

(1) Lands which are held by the Indians in fee simple, as in the Tuscarora Reservation;

(2) Lands which are held by the Indians pursuant to a treaty, agreement or statute, or under other circumstances constituting a recognition of Indian title; and

(3) Lands which are held by the Indians in their usual and accustomed manner, or which have been set aside by the Government under circumstances which do not constitute a recognition of title.

This Court has concluded that the Indians, and not the United States, have a proprietary interest in the lands described in Class 1 (Slip opinion, p. 16), while the United States, and not the Indians, has a proprietary interest in the lands described in Class 3. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951). The key to the instant case is the principle, repeatedly confirmed in past decisions of this Court, but apparently overlooked herein, that the proprietary interest of the Indians in the lands described in Class 2, which constitute the vast majority of all "tribal lands em-

braced within Indian reservations," is identical to the proprietary interest of the Indians in the lands described in Class 1.[1]

To be specific, in *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), this Court ruled that a reservation owned by the Indians in fee simple (Class 1) is private property within the meaning of the Fifth Amendment to the Constitution. Subsequently, in *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937), the Court reached exactly the same conclusion with respect to a reservation held by the Government in trust for the Indians (Class 2).[2] Then, in direct successor litigation, this Court expressly rejected the argument that possession of bare legal title by the Government in any way detracts from the Indians' property interest or lessens the compensation which otherwise is their due. *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-17 (1938).[3]

Tribal lands cannot at one and the same time belong wholly to the Indians, and yet also be the property of the United States. The foregoing cases thus demonstrate that the United States as a matter of law does not own, or even hold a compensable property interest

[1] The identity of the governmental interest in these two classes of land is unchallenged. *United States* v. *Hellard*, 322 U.S. 363, 366 (1944); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[2] In accord: *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938); *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-76 (1937).

[3] In the words of the Court (304 U.S. 116-17):

> "For all practical purposes, the tribe owned the land. . . . The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee."

in tribal lands embraced within Indian reservations to which the title of the Indians has been recognized. The Government's possession of a bare legal fee in such instances is a mere form, expressing in terms of record title the basic guardianship interest which attaches to Indian lands generally,[4] and does not convert the property of the Indians into lands or interests in lands owned by the United States. *United States* v. *Shoshone Tribe, supra; Leavenworth, etc., R.R. Co.* v. *United States*, 92 U.S. 733 (1876).

Even assuming that possession of a naked legal title gives the United States something in the nature of a proprietary interest in tribal lands, this fact still does not bring Class 2 lands under the Property Clause of the Constitution and thus within the limited definition of reservations propounded by the Court in this case. If the United States owns a 10% undivided interest in a tract of non-Indian land, for example, that proprietary interest does not make a "reservation" out of the remaining privately owned 90% interest. Similarly, if the United States possesses a proprietary interest in a tract of tribal land through its holding of a bare fee, that proprietary interest does not make a "reservation" out of the remaining beneficial interests concededly owned by the Indians. Like tribal lands held in fee simple, the latter interests are private property belonging to the Indians and may not be disposed of by the Government as Federal lands under authority only of the Property Clause.

For all practical purposes, the proprietary interests of the Indians in lands within Classes 1 and 2 are iden-

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[4] *Morrison* v. *Work*, 266 U.S. 481, 485 (1925); *Johnson* v. *M'Intosh*, 8 Wheat. (U.S.) 543 (1823); and cases cited in footnote 1, *supra*.

tical. The exclusion of lands which are held by the Indians in fee simple from the special protections accorded reservations under the Federal Power Act, therefore, necessarily requires a comparable exclusion of lands to which the Indians have recognized title. Such a construction of the statute, however, would limit the inclusive term "tribal lands embraced within Indian reservations" to a minor fraction of current Indian landholdings and, moreover, would restrict the protections of the Act to those tribal lands (Class 3) which are not legally entitled to any protection.

Congress could not have intended so to narrow the scope of the statutory safeguards over tribal lands embraced within Indian reservations to a dwindling category of lands and interests in lands owned in a proprietary sense by the United States. Indeed, the legislative history of the Federal Power Act is replete with evidence that Congress was not concerned with refinements of tribal title, but rather intended to protect all lands owned by or belonging to the Indians. *E.g.*, 59 CONG. REC. 1100, 1566-67, 1569 (1920); 58 CONG. REC. 2236 (1919). And, as long as lands to which the Indians have recognized title are within the statutory definition of "reservations", the exclusion therefrom of tribal lands held by the Indians in fee simple cannot legally or logically be justified.

The conclusion thus is inescapable—unless the manifest will of Congress is to be thwarted—that the term "tribal lands embraced within Indian reservations," as used in the Act, covers all such tribal property regardless of whether the Indians or the United States holds ultimate fee title.

CONCLUSION

For the foregoing reasons, respondent urges that a rehearing be granted and that the Court's ruling that the Tuscarora Reservation is not a "reservation" within the meaning of the Federal Power Act be withdrawn.

Respectfully submitted,

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April 1, 1960.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ARTHUR LAZARUS, JR.
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

Nos. 63 and 66.—October Term, 1959.

Federal Power Commission, Petitioner, 63 v. Tuscarora Indian Nation.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
Power Authority of the State of New York, Petitioner, 66 v. Tuscarora Indian Nation.	

[March 7, 1960.]

Mr. Justice Whittaker delivered the opinion of the Court.

The ultimate question presented by these cases is whether certain lands, purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River near the town of Lewiston, New York, may be taken for the storage reservoir of a hydroelectric power project, upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in Public Law 85–159, approved August 21, 1957. 71 Stat. 401.

The Niagara River, an international boundary stream and a navigable waterway of the United States, flows from Lake Erie to Lake Ontario, a distance of 36 miles. Its mean flow is about 200,000 cubic feet per second. The river drops about 165 feet at Niagara Falls and an additional 140 feet in the rapids immediately above and below the falls. The "head" created by these great falls, combined with the large and steady flow of the river, make

the Lewiston power site, located below the rapids, an extremely favorable one for hydroelectric development.

For the purpose of avoiding "continuing waste of a great natural resource and to make it possible for the United States and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes," the United States and Canada entered into the Treaty of February 27, 1950,[1] providing for a flow of 100,000 cubic feet per second over Niagara Falls during certain specified daytime and evening hours of the tourist season (April 1 to October 31) and of 50,000 cubic feet per second at other times, and authorizing the equal division by the United States and Canada of all excess waters for power purposes.[2]

In consenting to the 1950 Treaty, the Senate imposed the condition that "no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress." 1 U. S. T. 644, 699. To that end, a study was made and reported to Congress in 1951 by the United States Army Corps of Engineers respecting the most feasible plans for utilizing all of the waters available to the United States under the 1950 Treaty, and detailed plans embodying other studies were prepared and submitted to Congress prior to June 7, 1956, by the Bureau of Power of the Fed-

[1] 1 U. S. T. 694.

[2] The excess flow of water available for power purposes under the 1950 Treaty was estimated to fluctuate between 44,000 and 210,000 cubic feet per second, depending on the flow, the time of year, and the time of day. S. Rep. No. 539, 85th Cong., 1st Sess., p. 4.

The 1950 Treaty superseded the Boundary Waters Treaty of 1909 (Treaty Series 548, 36 Stat. 2448) which limited diversions of water by Canada to 36,000, and by the United States to 20,000, cubic feet per second. Beginning in 1921, the waters available to the United States under that treaty were utilized by Niagara Mohawk Power Corporation in its Schoellkopf hydroelectric plant, under a federal license expiring in 1971. The rated capacity of that plant was 300,000 kilowatts.

eral Power Commission, the Power Authority of New York, and the Niagara Mohawk Power Corporation.[3] To enable utilization of all of the United States share of the Niagara waters by avoiding waste of the night- and week-end flow that would not be needed at those times for the generation of power, all of the studies and plans provided for a pumping-generating plant to lift those waters at those times into a reservoir, and for a storage reservoir to contain them until released for use—through the pumping-generating plant, when its motors (operating in reverse) would serve as generators—during the daytime hours when the demand for power would be highest and the diversion of waters from the river would be most restricted by the treaty. Estimates of dependable capacity of the several recommended projects varied from 1,240,000 to 1,723,000 kilowatts, and estimates of the needed reservoir capacity varied from 22,000 acre-feet covering 850 acres to 41,000 acre-feet covering 1,700 acres. The variations in these estimates were largely due to differing assumptions as to the length of the daily period of peak demand.

Although there was "no controversy as to the most desirable engineering plan of development,"[4] there was serious disagreement in Congress over whether the project should be publicly or privately developed and over marketing preferences and other matters of policy. That disagreement continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses,[5] and delayed congressional authorization of the project for seven years.

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[3] S. Rep. No. 539, 85th Cong., 1st Sess., pp. 5–6.

[4] *Ibid.*

[5] Hearings were held before the Senate Committee on Public Works, or a Subcommittee, in the Eighty-second, Eighty-third and Eighty-fourth Congresses, and in the first session of the Eighty-fifth Congress; before the House Committee on Public Works in the first

On June 7, 1956, a rock slide destroyed the Schoellkopf plant.[6] This created a critical shortage of electric power in the Niagara community. It also required expansion of the plans for the Niagara project if the 20,000 cubic feet per second of water that had been reserved for the Schoellkopf plant was to be utilized. Accordingly, the Power Authority of New York prepared and submitted to Congress a major revision of the project plans. Those revised plans, designed to utilize all of the Niagara waters available to the United States under the 1950 Treaty, provided for an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be dependable power for 17 hours per day, necessitating a storage reservoir of 60,000 acre-feet capacity covering about 2,800 acres.[7]

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sessions of the Eighty-first and Eighty-second Congresses, and in the first and second sessions of the Eighty-fourth Congress. Joint hearings were held by the House Committee and a Subcommittee of the Senate Committee in the Eighty-third Congress, first session. Reports on these bills were S. Rep. No. 2501, 83d Cong., 2d Sess.; H. R. Rep. No. 713, 83d Cong., 1st Sess.; S. Rep. No. 1408, 84th Cong., 2d Sess.; H. R. Rep. No. 2635, 84th Cong., 2d Sess. The Committee Reports on the bill which was finally enacted were S. Rep. No. 539, 85th Cong., 1st Sess.; H. R. Rep. No. 862, 85th Cong., 1st Sess.

[6] See note 2.

[7] The Report of the Senate Committee on Public Works of June 27, 1957, reporting out the bill that was finally adopted, contained the following statement:

"The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required." S. Rep. No. 539, 85th Cong., 1st Sess., p. 5.

The Report of the House Committee on Public Works of July 23, 1957, contained the following statement:

"As a result of the [Schoellkopf] disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project

Confronted with the destruction of the Schoellkopf plant and the consequent critical need for electric power in the Niagara community, Congress speedily composed its differences in the manner and terms prescribed in Public Law 85–159, approved August 21, 1957. 71 Stat. 401. By § 1(a) of that Act, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the waters of the Niagara River permitted to be used by international agreement." By § 1 (b) of the Act, the Federal Power Commission was directed to "include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act," seven conditions which are of only collateral importance here.[8] The concluding section of the Act, § 2, provides: "The license issued under the terms

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with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required." H. R. Rep. No. 862, 85th Cong., 1st Sess., p. 7.

[8] Those seven conditions resolved the previously disputed issues which had so long delayed congressional authorization of the project. By those conditions, at least 50% of the project power must be made available to public bodies and nonprofit cooperatives "at the lowest rates reasonably possible," and 20% of that amount must be made available for use in neighboring States. Niagara Mohawk Power Corporation was given the right to purchase 445,000 kilowatts for a designated period to supply, and "restore low power costs to," the customers of its Schoellkopf plant, in exchange for relinquishment of its federal license. The Power Authority of New York was authorized to construct independent transmission lines to reach its preference customers and to control the resale rates of distributors purchasing power from it. The project was required to bear the United States share of the cost of remedial works in the river, and, within a designated maximum sum, the cost of a scenic drive and a park.

of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized."

Thereafter, the Power Authority of the State of New York, a municipal corporation created under the laws of that Stat to develop the St. Lawrence and Niagara power projects, applied to the Federal Power Commission for the project license which Congress had thus directed the Commission to issue to it. Its application embraced the project plans that it had submitted to the Eighty-fifth Congress shortly before its approval of Public Law 85–159.[9] The project was scheduled to be completed in 1963 at an estimated cost of $720,000,000.

Hearings were scheduled by the Commission, of which due notice was given to all interested parties, including the Tuscarora Indian Nation inasmuch as the application contemplated the taking of some of its lands for the reservoir. The Tuscarora Indian Nation intervened and objected to the taking of any of its lands upon the ground "that the applicant lacks authority to acquire them." At the hearings it was shown that the Tuscarora lands needed for the reservoir—then thought to be about 1,000 acres—are part of a separate tract of 4,329 acres purchased in fee simple by the Tuscarora Indian Nation, with the assistance of Henry Dearborn, then Secretary of War, from the Holland Land Company on November 21, 1804, with the

[9] The plans embraced by the application for the license consisted, in general, of (1) the main generating plant on the east bank of the river, (2) a pumping-generating plant, located a short distance east of the main generating plant, (3) a storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 2,800 acres, (4) a water intake structure on the east bank of the river about three miles above the falls, and (5) a water conveyance system extending from the intake to a forebay at the pumping-generating plant, and from the latter to a forebay at the main generating plant.

proceeds derived from the contemporaneous sale of their lands in North Carolina—from which they had removed in about the year 1775 to reside with the Oneidas in central New York."[10]

After concluding the hearings, the Commission, on January 30, 1958, issued its order granting the license. It found that a reservoir having a usable storage capacity of 60,000 acre-feet "is required to properly utilize the water resources involved." Although the Commission found that the Indian lands "are almost entirely undeveloped except for agricultural use," it did not pass upon

[10] Because the proceeds of the sale of the Tuscaroras' North Carolina lands ($15,000) were payable in three equal annual installments and were to be used, so far as necessary, for the payment of the purchase price of the New York lands ($13,752.80), which was also payable in three substantially equal annual installments, the latter lands were conveyed on November 21, 1804, by deed of the Holland Land Company (which acknowledged receipt of the first installment of the purchase price, and reserved a lien to secure the two unpaid installments of the purchase price) to Henry Dearborn "in Trust" for the "Tuscarora Nation of Indians and their assigns forever . . . the said Henry Dearborn and his Heirs [to] grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct and appoint." After collection of the remaining installments of the purchase price of the Tuscaroras' North Carolina lands and, in turn, remitting to the Holland Land Company so much thereof as was necessary to pay the balance of the purchase price for the New York lands, Henry Dearborn conveyed the New York lands to the "Tuscarora Nation of Indians and their successors and assigns forever," in fee simple free and clear of encumbrances, on January 2, 1809. The Tuscarora Indian Nation has ever since continued to own those lands under that conveyance.

In addition to the 4,329 acres purchased from the Holland Land Company in 1804, the Tuscaroras' reservation embraces two other contiguous tracts containing 1,920 acres. The first, a tract of 640 acres, was ceded to the Tuscaroras by the Holland Land Company in June 1798. The second, a tract of 1,280 acres, was ceded to them by the Holland Land Company in 1799. Those tracts are not involved in this case.

the Tuscaroras' objection to the taking of their lands because it then assumed that "other lands are available for reservoir use if the applicant is unable to acquire the Indian lands." But the Commission did direct the licensee to revise its exhibit covering the reservoir, to more definitely show the area and acreage involved, and to resubmit it to the Commission for approval within a stated time.

In its application for rehearing, the Tuscarora Indian Nation contended, among other things, that the portion of its lands sought to be taken for the reservoir was part of a "reservation," as defined in § 3 (2), and as used in § 4 (e), of the Federal Power Act,[11] and therefore could not lawfully be taken for reservoir purposes in the absence of a finding by the Commission "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." By its order of March 21, 1958, denying that application for rehearing, the Commission found that "[t]he best location of the reservoir would require approximately 1,000 acres of land owned by Intervener," and it held that the Indian lands involved "are not part of a 'reservation' referred to in section 4 (e) as defined in section 3 (2) of the [Federal Power] Act, and the finding suggested by Intervener is not required." On May 5, 1958, the Commission issued its order approving the licensee's revised exhibit which precisely delineated the location, area, and acreage to be embraced by the reservoir—which included 1,383 acres of the Tuscaroras' lands.

On May 16, 1958, the Tuscarora Indian Nation filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging the license issued by the Commission on January 30, 1958, insofar as it

[11] 49 Stat. 838, as amended, 16 U. S. C. §§ 796 (2) and 797 (e).

would authorize the taking of Tuscarora lands.[12] By its opinion and interim judgment of November 14, 1958, the Court of Appeals held that the Tuscarora lands sought to be taken for the reservoir constitute a part of a "reser-

[12] Meanwhile, on April 15, 1958, the Power Authority of New York commenced so-called "appropriation" proceedings under § 30 of the New York State Highway Law, McKinney's Consol. Laws, c. 25, and also under Art. 5, Tit. 1, of the New York Public Authorities Laws, McKinney's Consol. Laws, c. 43-A, to condemn the 1,383 acres of Tuscarora lands for reservoir use.

On April 18, 1958, the Tuscarora Indian Nation filed a complaint in the United States District Court for the Southern District of New York against the Power Authority and the Superintendent of Public Works of New York, seeking (1) a declaratory judgment that the Power Authority had no right or power to take any of its lands without the express and specific consent of the United States, and (2) a permanent injunction against the appropriation or condemnation of any of its lands. The court issued a temporary restraining order. The action, being a "local" one, was then transferred to the District Court for the Western District of New York. After hearing, that court on June 24, 1958, denied the relief prayed, dissolved the restraining order, and dismissed the complaint on the merits. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 107.

On appeal, the Second Circuit affirmed in part and reversed in part. It held that the Power Authority was authorized under Public Law 58-159 and the Federal Power Act and by the Commission's license thereunder of January 30, 1958, to take the part of the Tuscarora lands needed for the reservoir, but that they could be taken only by a condemnation action in a state or federal court in the district where the property is located under and in the manner provided by § 21 of the Federal Power Act (16 U. S. C. § 814), and not by "appropriation" proceedings under the New York laws referred to. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885. The Tuscarora Indian Nation's petition to this Court for a writ of certiorari was denied on October 13, 1958, 358 U. S. 841. The Superintendent of Public Works of New York, a respondent in the Second Circuit proceedings, has appealed to this Court from so much of the judgment as denied a right to acquire the Tuscarora lands by appropriation proceedings under the New York laws, and that appeal is now pending here. (No. 4, Oct. Term, 1959.)

vation" within the meaning of §§ 3 (2) and 4 (e) of the Federal Power Act, and that the Commission may not include those lands in the license in the absence of a § 4 (e) finding that their taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired," and the court remanded the case to the Commission that it might "explore the possibility of making that finding.". 265 F. 2d 338.

Upon remand, the Commission held extensive hearings exploring not only the matter of the making of the finding held necessary by the Court of Appeals but also the possibility of locating the reservoir on other lands. In its order of February 2, 1959, the Commission found that the use of other lands for the reservoir would result in great delay, severe community disruption, and unreasonable expense; that a reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States share of the water of the Niagara River, as required by Public Law 85–159; that removal of the reservoir from the Tuscarora lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet and result in a loss of about 300,000 kilowatts of dependable capacity. But it concluded that, although other lands contiguous to their reservation might be acquired by the Tuscaroras,[13]

[13] In making the statement referred to in the text the Commission was doubtless alluding to the fact that in May 1958, the Power Authority offered the Tuscaroras $1,500,000 for the 1,383 acres, or in excess of $1,100 per acre, plus payment for, or removal to or replacing on other lands, the 37 houses located on these 1,383 acres and to construct for them a community center building, involving a total expenditure of about $2,400,000, which offer, the Commission says, has never been withdrawn.

The Tuscarora Indian Nation tells us in its brief that:

"What the Government unfortunately fails to point out is that the Power Authority's 'offer' was and still is an empty gesture since, as the court below and the Court of Appeals for the Second Circuit

the taking of the 1,383 acres of Tuscarora lands for the reservoir "would interfere and be inconsistent with the purpose for which the reservation was created or acquired." That order was transmitted to the Court of Appeals which, on March 24, 1959, after considering various motions of the parties, entered its final judgment approving the license except insofar as it would authorize the taking of Tuscarora lands for the reservoir, and remanded the case to the Commission with instructions to amend the license "to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." 265 F. 2d, at 344.

Because of conflict between the views of the court below and those of the Second Circuit, and of the general importance of the questions involved, we granted certiorari. 360 U. S. 915.

The parties have urged upon us a number of contentions, but we think these cases turn upon the answers to two questions, namely: (1) whether the Tuscarora lands covered by the Commission's license are part of a "reservation" as defined and used in the Federal Power Act, 16 U. S. C. § 791 (a) *et seq.*, and, if not, (2) whether, notwithstanding 25 U. S. C. § 177, those lands may be condemned by the licensee, under the eminent domain powers conferred by § 21 of the Federal Power Act, 16 U. S. C. § 814. We now turn to a consideration of those questions in the order stated.

I.

A Commission finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is required by § 4 (e)

both ruled, the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U. S. C. §§ 177, 233."

of the Federal Power Act, 16 U. S. C. § 797 (e), only if the lands involved are within a "reservation" in the sense of that term as defined and used in that Act. That by generally accepted standards and common understanding these Tuscarora lands may be part of a "reservation" is not at all decisive of whether they are such within the meaning of the Federal Power Act. Congress was free and competent artificially to define the term "reservations" for the purposes it prescribed in that Act. And we are bound to give effect to its definition of that term, for it would be idle for Congress to define the sense in which it used it "if we were free in despite of it to choose a meaning for ourselves." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. By § 3 (2) of the Federal Power Act, 16 U. S. C. § 2796 (2), Congress has provided:

> "SEC. 3. The words defined in this section shall have the following meaning for purposes of this chapter, to wit:
>
> "(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States*, and withdrawn, reserved or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose; but shall not include national monuments or national parks." (Emphasis added.)

The plain words of this definition seem rather clearly to show that Congress intended the term "reservations," wherever used in the Act, to embrace only "lands and interests in lands owned by the United States."

Turning to the definition's legislative history, we find that it, too, strongly indicates that such was the congressional intention. In the original draft bill of the Federal

Water Power Act of 1920, as proposed by the Administration and passed by the House in the Sixty-fifth and Sixty-sixth Congresses, the term was defined as follows:

> "'Reservations' means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, and lands and interest in lands acquired and held for any public purpose." [14]

It is difficult to perceive how congressional intention could be more clearly and definitely expressed. However, after the bill reached the Senate it inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, *and other*" (emphasis added) at the beginning of the definition.[15] When the bill was returned to the House it was explained that the Senate's "amendment recasts the House definition of 'reservations.'" [16] The bill as enacted contained the definition as thus recast. It remains in that form, except for the deletion of the words "national monuments, national parks," which was occasioned by the Act of March 3, 1921 (41 Stat. 1353), negating Commission authority to license any project works within "national monuments or national parks," and those words were finally deleted from the definition by amendment in 1935. 49 Stat. 838. It seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its "recasting" only specified, as illustrative, some of the "reservations" on "lands and interests in lands owned by the United States."

[14] See H. R. Rep. No. 715, 65th Cong., 2d Sess., p. 22; S. Rep. No. 180, 66th Cong., 1st Sess., p. 10.

[15] See S. Rep. No. 180, 66th Cong., 1st Sess., p. 10; 59 Cong. Rec. 1103.

[16] See H. R. Rep. No. 910, 66th Cong., 2d Sess., p. 7.

Further evidence that Congress intended to limit "reservations," for the "purposes of this chapter" (§ 3), to those located on "lands owned by the United States" or in which it owns an interest is furnished by its use of the term in the context of § 4 (e) of the Act. By that section Congress, after authorizing the Commission to license projects in streams or other bodies of water over which it has jurisdiction under the *Commerce Clause* of the Constitution (Art. I, § 8, cl. 3), authorized the Commission to license projects "upon any part of the public lands and reservations of the United States." Congress must be deemed to have known, as this Court held in *Federal Power Comm'n v. Oregon*, 349 U. S. 435, 443, that the licensing power, "in relation to public lands and reservations of the United States, springs from the Property Clause" of the Constitution—namely, the ". . . Power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States. . . ." Art. IV, § 3, cl. 2. In thus acting under the Property Clause of the Constitution, Congress must have intended to deal only with "the territory or other property belonging to the United States." *Ibid.*

Moreover, the Federal Power Act's plan of compensating for lands taken or used for licensed projects is explicable only if the term "reservations" is confined, as Congress evidently intended, to those located on "lands owned by the United States" or in which it owns a proprietary interest. By § 21, 16 U. S. C. § 814, licensees are authorized to *acquire* "the lands or property of others necessary to the" licensed project "by the exercise of the right of eminent domain" in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States; because § 10 (e) of the Act, 16 U. S. C. § 803 (e), expressly pro-

vides that "the licensee shall pay to the United States reasonable annual charges . . . for recompensating *it* for the *use, occupancy, and enjoyment* of *its* lands or other property" (emphasis added) devoted to the licensed project. It therefore appears to be unmistakably clear that by the language of the first proviso of that section saying, in pertinent part, "That when licenses are issued involving the use of Government dams or other structures owned by the United States or *tribal lands embraced within Indian reservations* (these italicized words being lifted straight from the § 3 (2) definition of 'reservations') the Commission shall . . . fix a reasonable annual charge for the use thereof. . . ." Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the "reasonable annual charges" to be paid to the *United States* for the use, occupancy, and enjoyment of "*its lands or other property.*" (Emphasis added.)

This analysis of the plain words and legislative history of the Act's definition of "reservations" and of the plan and provisions of the Act leaves us with no doubt that Congress, "for purposes of this chapter" (§ 3 (2)), intended to and did confine "reservations," including "tribal lands within Indian reservations" (§ 3 (2)), to those located on lands "owned by the United States" (§ 3 (2)), or in which it owns a proprietary interest.

The Court of Appeals did not find to the contrary. Indeed, it found that the Act's definition of "reservations" includes only those located on lands in which the United States "has an interest." But it thought that the national paternal relationship to the Indians and the Government's concern to protect them against improper alienation of their lands gave the United States the requisite "interest" in the lands here involved, and that the result "must be the same as if the phrase 'owned by the

United States [etc.],' were not construed as a limitation upon the term 'tribal lands [etc.].'" 265 F. 2d, at 342. We do not agree. The national "interest" in Indian welfare and protection "is not to be expressed in terms of property . . . ." *Heckman* v. *United States*, 224 U. S. 413, 437. The national "paternal interest" in the welfare and protection of Indians is not the "interest in lands *owned* by the United States" required, as an element of "reservations," by § 3 (2) of the Federal Power Act. (Emphasis added.)

Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation and no "interest" in them is "owned by the United States," we hold that they are not within a "reservation" as that term is defined and used in the Federal Power Act, and that a Commission finding under § 4 (e) of that Act "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is not necessary to the issuance of a license embracing the Tuscarora lands needed for the project.

II.

We pass now to the question whether the portion of the Tuscarora lands here involved may be condemned by the licensee under the provisions and eminent domain powers of § 21 of the Federal Power Act. Petitioners contend that § 21 is a broad general statute authorizing condemnation of "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project, and that lands owned by Indians in fee simple, not being excluded, may be taken by the licensee under the federal eminent domain powers delegated to it by that section. Parrying this contention, the Tuscarora Indian Nation argues that § 21, being only a general Act of Congress, does not apply to Indians or their lands.

The Tuscarora Indian Nation heavily relies upon *Elk* v. *Wilkins*, 112 U. S. 94. It is true that in that case the Court, dealing with the question whether a native-born American Indian was made a citizen of the United States by the Fourteenth Amendment of the Constitution, said: "Under the Constitution of the United States as originally established . . . . General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them." 112 U. S., at 99–100. However that may have been, it is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests. In *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, the funds of a restricted Creek Indian were held and invested for him by the Superintendent, and a question arose as to whether income from the investment was subject to federal income taxes. In an earlier case, *Blackbird* v. *Commissioner*, 38 F. 2d 976, the Tenth Circuit had held such income to be exempt from federal income taxation. But in this case the Board of Tax Appeals sustained the tax, the Tenth Circuit affirmed, and the Superintendent brought the case here. This Court observed that in the *Blackbird* case the Tenth Circuit had said that "to hold a general act of Congress to be applicable to restricted Indians would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with." That is precisely the argument now made here by the Tuscarora Indian Nation. But this Court, in affirming the judgment, said:

> "This does not harmonize with what we said in *Choteau* v. *Burnet* (1931), 283 U. S. 691, 693, 696:
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> "'The language of [the Internal Revenue Act of 1918] subjects the income of "every individual" to

tax. Section 213 (a) includes income "from any source whatever." The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The Act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. . . . The intent to exclude must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter.'

"The court below properly declined to follow its quoted pronouncement in Blackbird's case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See *Irwin* v. *Gavit*, 268 U. S. 161; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84; *Pitman* v. *Commissioner*, 64 F. (2d) 740. The purpose is sufficiently clear." 295 U. S., at 419–420.

In *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, this Court, in holding that the estate of a restricted Oklahoma Indian was subject to state inheritance and estate taxes under general state statutes, said:

"The language of the statutes does not except either Indians or any other person from their scope. [319 U. S., at 600.] If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." 319 U. S., at 607.

See, *e. g.*, *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 581–582; *United States* v. *Ransom*, 263 U. S. 691; *Kennedy* v. *Becker*, 241 U. S. 556, 563–564; *Choate* v. *Trapp*, 224 U. S. 665, 673.

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4 (e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3 (2) and 10 (e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. 265 F. 2d, at 343. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.

The Tuscarora Indian Nation insists that even if its lands are embraced by the terms of § 21 of the Federal Power Act, they still may not be taken for public use "without the express consent of Congress referring specifically to those lands," because of the provisions of 25 U. S. C. § 177.[17] That section, in pertinent part, provides:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any

[17] The Tuscaroras also rely upon 25 U. S. C. § 233, which confers, subject to qualifications, jurisdiction upon the courts of New York over civil actions between Indians and also between them and other

> Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent. See, *e. g.*, *United States* v. *Hellard*, 322 U. S. 363; *United States* v. *Candelaria*, 271 U. S. 432, 441–442; *Henkel* v. *United States*, 237 U. S. 51; *United States* v. *Sandoval*, 231 U. S. 46–48. But there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; "nor is it conceivable that it is necessary, for the Indians are subject only to the same rule of law as are others in the state. . . ." *United States* v. *Oklahoma Gas Co.*, 318 U. S. 206, 211.

As to the Tuscaroras' contention that § 177 prohibits the taking of any of their lands for the reservoir "without the express and specific consent of Congress," one thing is certain. It is certain that if § 177 is applicable to alienations effected by condemnation proceedings under § 21 of the Federal Power Act, the mere "expressed consent" of Congress would be vain and idle. For § 177 at the very least contemplates *the assent of the Indian nation or tribe*. And inasmuch as the Tuscarora Indian Nation withholds such consent and refuses to convey to the licensee any of its lands, it follows that the mere consent

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persons, and contains a pertinent proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York."

of Congress, however express and specific, would avail nothing. Therefore, if § 177 is applicable to alienations effected by condemnation under § 21 of the Federal Power Act, the result would be that the Tuscarora lands, however imperative for the project, could not be taken at all.

But, § 177 is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under § 21 of the Federal Power Act. The law is now well settled that:

> "A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States* v. *Wittek*, 337 U. S. 346, 358–359.

In *United States* v. *United Mine Workers of America*, 330 U. S. 258, 272–273, the Court said:

> "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."

See, *e. g.*, *Leiter Minerals, Inc.*, v. *United States*, 352 U. S. 220, 224–225; *United States* v. *Wyoming*, 331 U. S. 440, 449; *United States* v. *Stevenson*, 215 U. S. 190; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 553–555; *Lewis* v. *United States*, 92 U. S. 618, 622; *United States* v. *Herron*, 20 Wall. 251, 263; *The Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239.

This Court has several times applied, in combination, the rules (1) that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary, and (2) that general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect. It did so in *Henkel* v. *United States*, 237 U. S. 43 (sustaining the right of the United States to take Indian lands for reservoir purposes under the general Reclamation Act of June

17, 1902, 32 Stat. 388), in *Spalding* v. *Chandler*, 160 U. S. 394 (sustaining the power of the Government to convey a strip of land through a tract owned by an Indian tribe to one Chandler for the use of the State of Michigan in constructing a canal, even though the conveyance was in derogation of a treaty with the Indian tribe), and in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641. There, this Court sustained the right of a licensee of the Government to take so much of the undescribed fee lands of an Indian tribe as were necessary for the licensed project, though in derogation of the terms of a treaty between the United States and the Indian tribe, saying:

> "It would be very strange if the national government in the execution of its rightful authority, could exer-

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[18] The Tuscarora Indian Nation argues that its lands in question should be regarded as subject to and protected from condemnation by the Treaty of Fort Stanwix of 1784 (7 Stat. 15), the unratified Treaty of Fort Harmar of 1789 (7 Stat. 33), and the Treaty of Canandaigua of 1794 (7 Stat. 44). But the record shows that the first two of these treaties related to other lands and, principally at least, to other Indian nations, and that the last treaty mentioned, though covering the lands in question, was with another Indian nation (the Senecas) which, pursuant to the Treaty of Big Tree in 1797 (7 Stat. 601) and with the approbation of the United States, sold its interest in these lands to Robert Morris and thus freed them from the effects of the Treaty of Canandaigua of 1794. Robert Morris, in turn, conveyed these lands to the Holland Land Company and it, in turn, conveyed the part in question to the Tuscarora Indian Nation and its title rests upon that conveyance, free of any treaty.

It appears from the record that, as earlier stated (see note 1), the Tuscaroras, save for a few of them who remained on their lands "on the Roanoke" in North Carolina, moved from their North Carolina lands to reside with the Oneidas in central New York—at a point about 200 miles east of the lands now owned by the Tuscaroras in Niagara County, New York—in 1775. The Tuscaroras had no proprietary interest in the Oneidas' lands in central New York but were there as "guests" of the Oneidas or as "tenants at will or by suffer-

cise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States.

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ance." Hough, Census of the State of New York, 1857, p. 510. New York Senate Document No. 24, 1846, p. 68. They came to be recognized, however, as members of the Five Nations which thereafter became known as the Six Nations (the others being the Oneidas, the Mohawks, the Onondgas, the Cayugas and the Senecas). The Senecas occupied a vast area in western New York, including the lands here in question. A few Tuscaroras fought with the Senecas on the side of the British and after their defeat at the battle of Elmira in 1779, they went to reside with the Senecas in the vicinity of Fort Niagara in about 1780. Other Tuscaroras then moved to that place. Just when they did so is not known with certainty and it appears that the most that can be said is that they were there prior to 1797. The Tuscaroras had the same kind of tenure, *i. e.*, guests or tenants at will or by sufferance, with the Senecas as they had earlier had with the Oneidas in central New York. One of their chiefs described their situation as "squatters upon the territory of another distinct nation."

By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty of Fort Harmar of 1789 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the lands in question. By the same treaties the United States promised to secure to the Six Nations a tract of land in western New York in the vicinity of the Niagara River. By the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations, which superseded the prior treaties (except, by Article 6, the United States remained bound to pay the Tuscaroras $4,500 per year for the purchase of clothing), it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas.

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty over those lands and Massachusetts to own the underlying fee to those lands and the right to purchase the Senecas' interest in them. In 1794, Massachusetts sold the fee and the right to purchase the Senecas' right to occupy these western New York lands, including the lands now owned

> and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." 135 U. S., at 656–657.

See also *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; *Missouri-Kansas & Texas R. Co.* v. *Roberts*, 152 U. S. 114, 117–118; *Beecher* v. *Wetherby*, 95 U. S. 517; *Kohl* v. *United States*, 91 U. S. 367.

In the light of these authorities we must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras (see notes 10 and 18); and that 25 U. S. C. § 177 does not apply to the United States itself nor prohibits it, or its licensees under the Federal Power Act, from taking such lands in

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by the Tuscaroras, to Robert Morris, who, in turn, sold those lands and rights to the Holland Land Company with the covenant that he would buy out the Senecas' rights of occupancy for and on behalf of the Holland Land Company. And at the Treaty of Big Tree of 1797 (7 Stat. 601), Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus the lands in question were entirely freed from the effects of all then existing treaties with the Indians, and the Tuscaroras' title to its present lands derives, as earlier stated, from the Holland Land Company (see note 10 for further details) and has never since been subject to any treaty between the United States and the Tuscaroras.

the manner provided by § 21, upon the payment of just compensation.

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by any other; but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project does not breach the faith of the United States, nor any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

Reversed.

MR. JUSTICE BRENNAN concurs in the result.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 66.—OCTOBER TERM, 1959.

Federal Power Commission, Petitioner, 63 v. Tuscarora Indian Nation.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
Power Authority of the State of New York, Petitioner, 66 v. Tuscarora Indian Nation.	

[March 7, 1960.]

MR. JUSTICE BLACK, whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

The Court holds that the Federal Power Act [1] authorizes the taking of 22% (1,383 acres) of the single tract which the Tuscarora Indian Nation has owned and occupied as its homeland for 150 years.[2] Admittedly this

[1] 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–828c.

[2] While the petitioners have argued that Congress authorized this taking in the 1957 Niagara Power Act, 71 Stat. 401, 16 U. S. C. §§ 836–836a, the Court does not accept this argument. Neither do I. There is absolutely no evidence that Congress was in any way aware that these Tuscarora lands would be required by the Niagara Power Project. The petitioners have also argued that Congress impliedly authorized this taking in the 1957 Act because in fact the Tuscarora lands are indispensable to the Niagara Power Project. But the record shows that the reservation lands are not indispensable. The Federal Power Commission first found that "other lands are available." 19 F. P. C. 186, 188. And see 265 F. 2d 338, 343. On remand the Commission refused to find that the Indian lands were indispensable, although it did find that use of other lands would be much more expensive. 21 F. P. C. 146. And see 21 F. P. C. 273, 275. That other lands are more expensive is hardly proof that the Tuscarora lands are indispensable to this $700,000,000 project.

taking of so large a part of the lands will interfere with the purpose for which this Indian reservation was created—a permanent home for the Tuscaroras. I not only believe that the Federal Power Act does not authorize this taking, but that the Act positively prohibits it. Moreover, I think the taking also violates the Nation's long-established policy of recognizing and preserving Indian reservations for tribal use, and that it constitutes a breach of Indian treaties recognized by Congress since at least 1794.

Whether the Federal Power Act permits this condemnation depends, in part, upon whether the Tuscarora Reservation is a "reservation" within the meaning of the Act. For if it is, § 4 (e) forbids the taking of any part of the lands except after a finding by the Federal Power Commission that the taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired . . . ."[3] There is no such finding here. In fact, the Commission found that the inundation of so great a part of the Tuscarora Reservation by the waters of the proposed reservoir "will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." 21 F. P. C. 146, 148. If these

[3] Section 4 (e) contains the general grant of power for the Federal Power Commission to issue licenses for federal power projects. The part that is of crucial significance here reads:

"[L]icenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations. . . ."

Title 16 U. S. C. § 797 (e), enacted as § 4 (d) in the Federal Water Power Act of 1920, 41 Stat. 1063, was re-enacted in the 1935 amendments, 49 Stat. 838, as § 4 (e) and is referred to as such throughout

Tuscarora homelands are "tribal lands embraced within [an] Indian reservation" as used in § 3 (2) [1] they constitute a "reservation" for purposes of § 4 (e), and therefore the taking here is unauthorized because the requisite finding could not be made.

I believe the plain meaning of the words used in the Act, taken alone, and their meaning in the light of the historical background against which they must be viewed, require the conclusion that these lands are a "reservation" entitled to the protections of § 4 (e) of the Act. "Reservation," as used in § 4 (e), is defined by § 3 (2), which provides:

> "'reservations' means national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; . . . ." (Emphasis supplied.)

The phrase: "tribal lands embraced within Indian reservations" surely includes these Tuscarora lands. They are tribal lands. They are embraced within the Tuscarora Indian Nation's reservation. The lands have been called a reservation for more than 150 years. They have been so described in treaties, Acts of Congress, court decisions, Indian agency reports, books, articles, and maps. In fact, so far as I can ascertain they have never been called anything else, anywhere or at anytime—until today. Even the Court of Appeals and

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[1] Section 3, 16 U. S. C. § 796, is the general definitions section of the Federal Power Act, and was first enacted in the Federal Water Power Act of 1920, 41 Stat. 1063. Section 3 (2) defines the term "reservations."

the Federal Power Commission, and the briefs and record in this Court, quite naturally refer to this 10-square-mile tract of land as an Indian reservation. The Court itself seems to accept the fact that the Tuscarora Nation lives on a reservation according to (in its words) the "generally accepted standards and common understanding" of that term.

The Court, however, decides that in the Federal Power Act Congress departed from the meaning universally given the phrase "tribal lands embraced within Indian reservations" and defined the phrase, the Court says, "artificially." The Court believes that the words "other lands . . . owned by the United States," which follow, were intended by Congress to limit the phrase to include only those reservations to which the United States has technical legal title. By the Court's "artificial" interpretation, the phrase turns out to mean 'tribal lands embraced within Indian reservations—except when 'the lands involved are owned in fee simple by the [Indians].'".[5]

Creating such a wholly artificial and limited definition, so new and disruptive, imposes a heavy burden of justification upon the one who asserts it. We are told that many tribes own their reservation lands. The well-known Pueblos of New Mexico own some 700,000 acres of land in fee. All such reservation lands are put in jeopardy by the Court's strained interpretation. The Court suggests no plausible reason, or any reason at all for that matter, why Congress should or would have sought artificially to place those Indians who hold legal title to their reservation lands in such a less-favored position.[6] The fact that

[5] The Court's opinion states: "Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation . . . we hold that they are not within a 'reservation' . . . ."

[6] In *United States* v. *Candelaria*, 271 U. S. 432, 440, and *United States* v. *Sandoval*, 231 U. S. 28, 39, this Court has held that the

the Tuscarora Nation holds technical legal title is fortuitous and an accidental circumstance probably attributable to the Indian land policy prevailing at the early date this reservation was established.[1] Their lands, like all other Indian tribal lands, can be sold, leased or subjected to easements only with the consent of the United States Government. Congress and government agencies have always treated the Tuscarora Reservation the same as all others,[2] and there is no reason even to suspect that Congress wanted to treat it differently when it passed the Federal Power Act.

It is necessary to add no more than a word about the legislative history of this section which the Court relies on. The Court points out that the House version of the 1920 Federal Water Power Act (now called the Federal Power Act) defined "reservations" as meaning only "lands and interests in lands owned by the United States." In this definition of "reservations" the Senate inserted new words which included the present phrase "tribal lands embraced within Indian reservations." If the only Indian lands Congress sought to cover by this section were those to which the United States had title, the Senate

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Pueblos' fee simple ownership of their lands has no effect whatsoever on the United States' rights and responsibilities towards these Indians and their lands. See *The New York Indians*, 5 Wall. 761, 767, for a similar holding as to Seneca Indian lands in New York governed by the same treaty under which the Tuscaroras assert their rights in this case. And see also *United States* v. *Hellard*, 322 U. S. 363, 366 ("the governmental interest . . . is as clear as it would be if the fee were in the United States"); *Minnesota* v. *United States*, 305 U. S. 382; *Heckman* v. *United States*, 224 U. S. 413.

[2] See, *e. g.*, Report of the Commissioner of Indian Affairs, H. R. Exec. Doc. No. 1, Vol. I, Pt. 5, 45th Cong., 2d Sess. 398, 558–564 (1877). See also 64 Stat. 845, 25 U. S. C. § 233, which specifically subjects all New York tribes to Rev. Stat. § 2116 (1875), 25 U. S. C. § 177, which bans alienation of their lands without the consent of Congress. And see generally notes 6, *supra*, 9, 11, 16, 17, 20, *infra*

addition served no purpose. For the House bill covered all "lands . . . owned by the United States." The only reason for the Senate additions, it seems to me, was to cover lands, like those of the Tuscarora Nation here, title to which was *not* in the United States Government.

The Court also undertakes to support its "artificial" definition of "tribal lands embraced within Indian reservations" by saying that the Congress knew, by a prior decision of this Court, that it was acting under Art. IV, § 3, cl. 2, of the Constitution, which gives Congress power, as the Court says, "to deal only with 'the territory or other property belonging to the United States.'" In the first place I do not understand how the Court can say with such assurance that the Congress was acting only under that clause, as there is no evidence whatsoever that Congress expressed itself on this matter. Moreover, it seems far more likely to me that in this phrase regulating Indian tribes Congress was acting under Art. I, § 8, cl. 3, which empowers Congress "to regulate Commerce with . . . the Indian tribes."

Even accepting for a moment the Court's "artificial" definition, I think the United States owns a sufficient "interest" in these Tuscarora homelands to make them a "reservation" within the meaning of the Act. Section 3 (2) does not merely require a finding in order to take "tribal lands embraced within Indian reservations;" the same finding is required in order to take "other . . . interests in lands owned by the United States" whether tribal or not. Or, again accepting the Court's conception, if the phrase "tribal lands embraced within Indian reservations" must be modified by the words which follow, "lands . . . owned by the United States," it must also be modified by the words "interests in lands owned by the United States," which also follow. Read this way, the section defines "reservations" as tribal lands in which the United States owns "interests." Thus again a finding

under § 4 (e) is required even under the Court's own technical approach if the United States owns "interests" in the lands. I think it does.

Certainly the words Congress used, "interests in lands," are not surplusage; they have some meaning and were intended to accomplish some purpose of their own. The United States undobutedly controls (has "interests in") many lands in this country that it does not own in fee simple. This is surely true as to all Indian tribal lands, even though the Indians own the fee simple title.[8] Such lands cannot be sold or leased without the consent of the United States Government. The Secretary of the Interior took this position about this very reservation in 1912 when the Tuscaroras desired to lease a part of their lands to private individuals for limestone quarrying.[9] And, of course, the long-accepted concept of a guardian-ward relationship between the United States and its Indians, with all the requirements of fair dealing and protection that this involves, means that the Indians are not free to treat their lands as wholly their own.[10] Anyone doubting the extent of ownership interest in these lands by the United States would have that doubt rapidly removed should he take a deed from the Tuscarora Nation without the con-

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[8] The Court of Appeals held the United States had an adequate § 3 (2) "interest in" the Tuscarora Reservation to require a § 4 (e) finding. 265 F. 2d 338, 342. See notes 6, *supra*, and 16, *infra*.

[9] See 51 Cong. Rec. 11659–11660, 14561–14562. And see note 16, *infra*.

[10] See, *e. g.*, *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657; *Elk* v. *Wilkins*, 112 U. S. 94, 99; *Ex parte Crow Dog*, 109 U. S. 556, 569; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17. See also *United States* v. *Candelaria*, 271 U. S. 432, 442, where this Court pointed out that the same concept had applied under Spanish and Mexican law. And see also *United States* v. *Kagama*, 118 U. S. 375, 384 ("duty of protection"), and Chief Justice Marshall's leading opinion in *Johnson* v. *McIntosh*, 8 Wheat. 543, 591 ("Indians [are] to be protected . . . in the possession of their lands").

sent of the Government.[11] I cannot agree, therefore, that this all but technical fee ownership which the United States has in these lands is inadequate to constitute the kind of "interests in lands owned by the United States" which requires a § 4 (e) finding before condemnation.

After the Court concludes that because of its interpretation of the definition of "reservations" in § 3 (2) a finding is not required by § 4 (e) to take the Tuscarora lands, it goes on to find the necessary congressional authorization to take these lands in the general condemnation provisions of § 21. 16 U. S. C. § 814. I believe that this is an incorrect interpretation of the general power to condemn under § 21, both because Congress specifically provided for the taking of all Indian reservation lands it wanted taken in other sections of the same Act, and because a taking under § 21 is contrary to the manner in which Congress has traditionally gone about the taking of Indian lands—such as Congress here carefully prescribed in § 4 (e). Congress has been consistent in generally exercising this power to take Indian lands only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian lands. None of these conditions is satisfied here if § 21 is to be relied upon. The specific and detailed provisions of § 10 (e), 16 U. S. C. § 803 (e), upon which the Court relies, only emphasize to me the kind of care Congress always takes to protect the just claims of Indians to reservations like this one.

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[11] In *United States* v. *Candelaria*, 271 U. S. 432, for example, this Court held that the United States could set aside a deed from the Pueblos of lands to which the Indians had fee simple title, even though the issue in the case had been settled by otherwise applicable principles of *res judicata* in prior litigation to which the Indians, but not the United States, had been a party. See note 9, *supra*.

The cases which the Court cites in its opinion do not justify the broad meaning read into § 21. Many of those cases deal with taxation—federal and state. The fact that Indians are sometimes taxed like other citizens does not even remotely indicate that Congress has weakened in any way its policy to preserve "tribal lands embraced within Indian reservations." Moreover, cases dealing with individuals who are not Indians are not applicable to tribal reservations. For example, *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, cited by the Court, did not involve tribal lands. That case only held that a State may tax the production of an oil company even though it was derived from oil company lands leased from an Indian. The owner there was an individual Indian, not a tribe, and the lands were not and never had been a part of an Indian reservation, but rather had been purchased for this single Indian with the royalties he obtained from his own original restricted allotted lands. In *Henkel* v. *United States*, 237 U. S. 43, which involved the taking of Indian lands for the vast western reclamation project, the Court not only found that it had been "well known to Congress" that Indian lands would have to be taken, 237 U. S., at 50, but the treaty with the Indians involved in that case contained a specific consent by the Indians to such a taking. 29 Stat. 356, quoted 256 U. S., at 48. There was no provision even resembling this in the Treaty of 1794 with the Tuscaroras. Other cases, relied on by the Court, such as *Spalding* v. *Chandler*, 160 U. S. 394, and *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians' lands—unlike the history of § 21 of the Federal Power Act and the 1957 Niagara Power Act, 71 Stat. 401, 16 U. S. C. §§ 836–836a, involved here.

All that I have said so far relates to what the Court calls the "plain words" of the statute. I interpret these "plain words" differently than the Court. But there are other more fundamental and decisive reasons why I disagree with the Court's interpretation of the Federal Power Act as it relates to Indians. The provisions in § 4 (e) which protect Indian reservations against destruction by condemnation cannot be properly construed unless considered as a part of a body of Indian laws built up throughout this Nation's history, and extending back even to the Articles of Confederation. It is necessary to summarize briefly a part of that history.

The experience of the Tuscarora Nation illustrates this history as well as that of any Indian tribe.[12] When this country was discovered the Tuscarora Nation lived and owned its homelands in the area that later became North Carolina. Early settlers wanted their lands. The Tuscaroras did not want to give them up. Numerous conflicts arose because of this clash of desires. Finally, about 1710, there was a war between the Tuscaroras and the colonists in North and South Carolina. The Indians were routed. A majority of their warriors were killed. Hundreds of their men, women and children were captured and sold into slavery. Nearly all of the remainder

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[12] For general discussions of the Tuscaroras' history see Hodge (editor), Handbook of American Indians (1910), Pt. 2, 842 et seq., Smithsonian Institution Bureau of American Ethnology, Bulletin 30; H. R. Doc. No. 926, 59th Cong., 1st Sess.; Cohen, Handbook of Federal Indian Law (1941), 423; Morgan, League of the Iroquois (1904), I, 23, 42, 93, II, 77, 187, 345; Cusick, Ancient History of the Six Nations (1848), 31-35; H. R. Doc. No. 1590, 63d Cong., 3d Sess., 7, 11-15 (1915); H. R. Exec. Doc. No. 4, Vol. I, Pt. 5, 45th Cong., 2d Sess. 562-563 (1877). And see statements in *New York Indians v. United States*, 30 Ct. Cl. 413 (1895); *Tuscarora Nation of Indians v. Power Authority of New York*, 164 F. Supp. 107 (D. C. W. D. N. Y. 1958); *People ex rel. Cusick v. Daly*, 212 N. Y. 148, 105 N. E. 1048, 1050 (1914).

of the tribe fled. They found a home in distant New York with the Iroquois Confederation of Nations. With their acceptance into the Confederation about 1720 it became known as the Six Nations. Historical accounts indicate that about 1780 those Tuscaroras who had supported America in the Revolution were compelled to leave their first residence in New York because of the hostility of Indians who had fought with the British against the Colonies.[13] They migrated to the Village of Lewiston, New York, near Niagara Falls and settled in that area as their new home. They have remained there ever since—nearly 180 years. When their legal right to this land came into question about 1800 the Seneca Indians and the Holland Land Company both "thought their claim so just" [14] that they gave the Tuscarora Nation deeds to three square miles of the area they had been occupying for about 20 years. With the assistance of Presidents Washington and Jefferson and the Congress, the Tuscaroras were able, through the Secretary of War, to sell their vast North Carolina lands for $15,000. With this money, held by the Secretary of War as trustee, additional lands adjoining those received from the Seneca Indians and the Holland Land Company were obtained for the Tuscarora Nation and the title held in trust by the Secretary of War from 1804 to 1809. The Secretary supervised the payments to the Holland Land Company, from which the additional 4,329 acres were obtained; and when payments were completed he conveyed these lands to the Tuscarora Nation.[15] The 1,383 acres of the Tusca-

[13] See Handbook of American Indians, *op. cit., supra*, note 12, at 448.

[14] Letter from Theophile Cazenove to Joseph Ellicott, May 10, 1798, 1 Bingham (editor), Holland Land Company's Papers: Reports of Joseph Ellicott (Buffalo Hist. Soc. Pub. Vol. 32, 1937) 21, 23.

[15] In addition to the general histories cited, note 12, *supra*, this particular transaction is described in various letters and speeches

rora Reservation involved today is a part of this purchase. Despite all this and the Government's continuing guardianship over these Indians and their lands throughout the years the Court attempts to justify this taking on the single ground that the Indians, not the United States Government, now own the fee simple title to this property.

In 1838 the Government made a treaty with the Tuscaroras under which they were to be removed to other parts of the United States.[16] The removal was to be carried

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of the Tuscaroras and the Secretary of War. See Letters Sent by the Secretary of War Relating to Indian Affairs (National Archives Record Group 75, Interior Branch), Vol. A, 18-19, 22-23, 113-114, 117-119, 147-148, 402, 425-426, 438-439, Vol. B, 29, 274, 421; 6 Buffalo Hist. Soc. Pub. 221; and letter from Erastus Granger to Secretary of War Henry Dearborn, July 20, 1804, in Buffalo Hist. Soc. manuscript files. The deeds are recorded in the Niagara County Clerk's Office, Lockport; New York, Nov. 21, 1804, Liber B, pp. 2-7; Jan. 2, 1809, Liber A, p. 5. "[I]n 1804 Congress authorized the Secretary of War to purchase additional land for these Indians." From a Department of Interior letter, H. R. Doc. No. 1590, 63d Cong., 3d Sess. 7. And see the Court's note 10, and *Fellows* v. *Blacksmith*, 19 How. 366.

[16] Treaty of January 15, 1838, 7 Stat. 550, 554 (Article 14, "Special Provisions for the Tuscaroras").

The interest of the government in Indian lands was a part of the law of Spain, Mexico, Great Britain and other European powers during pre-Colonial days. *United States* v. *Candelaria*, 271 U. S. 432, 442; *United States* v. *Kagama*, 118 U. S. 375, 381; *Worcester* v. *Georgia*, 6 Pet. 515, 551-552; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17-18. The original Articles of Confederation provided for congressional control of Indian affairs in Article 9. A similar provision is in the Commerce Clause of the present Constitution. One of the first Acts of the new Congress was the so-called Non-Intercourse Act of July 22, 1790, 1 Stat. 137, which provided, in § 4, "That no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The similar provision is presently found in 25 U. S. C. § 177, as modified by 16 Stat. 566, 25 U. S. C. § 71.

out under the authority of a Congressional Act of 1830. 4 Stat. 411, which provided a program for removing the Indians from the Eastern United States to the West. Section 3 of that Act provided authority "for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them. . . ." The same Act also provided "that nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes." *Id.*, § 7.

The Tuscarora Nation then had such a treaty with the United States, which had been in existence since 1794 and is still recognized by Congress today.[17] The treaty

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[17] Treaty of November 11, 1794, 7 Stat. 44. Article 6 of that Treaty provides:

"[B]ecause the United States desire, with humanity and kindness, to contribute to their comfortable support . . . the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President [April 23, 1792]: making in the whole, four thousand five hundred dollars: which shall be expended yearly forever, in purchasing clothing, [etc.]. . . ."

Every Congress until the 81st indicated that their $4,500 annual appropriation rested upon "article 6, treaty of November 11, 1794." *E. g.*, 62 Stat. 1120, 80th Cong., 2d Sess. Subsequent Congresses simply appropriated a total amount for Indian treaty obligations including "treaties with Senecas and Six Nations of New York. . . ." *E. g.*, 63 Stat. 774, 81st Cong., 1st Sess. In 1951 the 82d Cong., 1st Sess., appropriated simply "such amounts as may be necessary after June 30, 1951" for this purpose. 65 Stat. 254. At the hearings it was explained that this provision "would have the effect of being permanent law insofar as making the funds available without having to be included in each annual appropriation act. . . . [I]t is a treaty obligation and has always been paid by the Government in full. These treaties have been in existence for many, many years." Director D. Otis Beasley, Division of Budget and Finance, Department of the Interior, Hearings before the Subcommittee on Interior Depart-

was made with all the Six Nations, at a time when the Tuscarora Nation had been a member for over 70 years, and one of their representatives signed the treaty.[9] In Article 3 of the Treaty the United States Government made this solemn promise:

> "Now, the United States acknowledge all the lands within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

This article of the 1794 Treaty substantially repeated the promise given the Tuscaroras in the prior 1784 Treaty, 7 Stat. 15, made before our Constitution was adopted, that "The Oneida and Tuscarora nations shall be secured in the possession of lands on which they are settled."

Of course it is true that in 1794, when the Treaty was signed, the Tuscarora Nation did not yet have the technical legal title to that part of the reservation which the Government was later able to obtain for it. But the solemn pledge of the United States to its wards is not to be construed like a money-lender's mortgage. Up to this

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ment of the House Committee on Appropriations on Interior Department Appropriations for 1952, 82d Cong., 1st Sess., Pt. 2, 1747, 1764.

[9] "Kanatsoyff, alias Nicholas Kusik," signed the 1794 Treaty as a Tuscarora, but is not so identified there. However, he also signed the Treaties of December 2, 1794, 7 Stat. 47, and January 15, 1838, 7 Stat. 550, for the Tuscarora Nation and is listed there as a "Tuscarora." It has never even been hinted, until the Court's note is today, that the Tuscarora Nation is for some reason not included in this November 11, 1794, Six Nations' Treaty.

time it has always been the established rule that this Court would give treaties with the Indians an enlarged interpretation; one that would assure them beyond all doubt that this Government does not engage in sharp practices with its wards."[19] This very principle of interpretation was applied in the case of *The New York Indians*, 5 Wall. 761, 768, where the Court said, about *this* treaty:

> "It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold."

After the Treaty of 1838 was signed, in which the Tuscaroras agreed to go west, they decided not to do so, and the Government respected their objections and left them with their lands. They have, since that time, held it as other Indians have throughout the Nation. This has been in accord with the settled general policy to preserve such reservations against any kind of taking, whether by private citizens or government, that might

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[19] *The Kansas Indians*, 5 Wall. 737, 760 ("enlarged rules of construction are adopted in reference to Indian treaties"); *Worcester v. Georgia*, 6 Pet. 515, 582 ("The language used in treaties with the Indians should never be construed to their prejudice' . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction") (concurring opinion); *Tulee v. Washington*, 315 U. S. 681, 685 ("in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"). And see *Spalding v. Chandler*, 160 U. S. 394, 405; *Elk v. Wilkins*, 112 U. S. 94, 100; *Ex parte Crow Dog*, 109 U. S. 556, 572; *United States v. Rogers*, 4 How. 567, 572.

result in depriving Indian tribes of their homelands against their will.[20] President Jackson, in 1835, explained the purpose of the removal and reservation program as meaning that, "The pledge of the United States has been

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[20] The origins of this policy extend into pre-Colonial British history. As Chief Justice Marshall said in *Worcester* v. *Georgia*, 6 Pet. 515, 547, in speaking of the Indian land policy,

"The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them."

Chief Justice Marshall quoted at the same place similar language from a speech made to the American Indians by the British Superintendent of Indian affairs in 1763. This principle has been consistently recognized by this Government and this Court. *Spalding* v. *Chandler*, 160 U. S. 394, 403; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 197; *The New York Indians*, 5 Wall. 761, 768; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Johnson* v. *McIntosh*, 8 Wheat. 543. And see 48 Stat. 987, 25 U. S. C. § 476; 25 U. S. C. §§ 311-328 and 25 CFR § 161.3 (a).

The age and scope of this doctrine of guardianship and fairness to the Indians is well illustrated in a statement made by President Washington, December 29, 1790, responding to an address by the chiefs and councilors of the Seneca Nation:

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered: the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights." 4 American State Papers (Indian Affairs, Vol. I, 1832) 142; 31 Washington, Writings (United States George Washington Bicentennial Comm'n ed. 1939) 179, 180.

given by Congress that the country destined for the residence of this people shall be forever 'secured and guaranteed to them.' "[21] This policy was so well settled that when the Missouri compromise bill was being discussed in Congress in 1854 Texas Senator Sam Houston used this picturesque language to describe the Government's promise to the Indians:

> "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again removed from your present habitations."[22]

It was to carry out these sacred promises made to protect the security of Indian reservations that Congress adopted § 4 (e) which forbids the taking of an Indian reservation for a power project if it will "interfere . . . with the purpose for which such reservation was created or acquired . . . ." But no such finding was made or could be made here.

There can be no doubt as to the importance of this power project. It will be one of the largest in this country and probably will have cost over $700,000,000 when it is completed. It is true that it will undoubtedly cost more to build a proper reservoir without the Tuscarora lands, and that there has already been some delay by reason of this controversy. The use of lands other than those of the tribe will cause the abandonment of more homes and the removal of more people. If the decision in this case depended exclusively upon cost and inconvenience, the Authority undoubtedly would have

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[21] Seventh Annual Message, Dec. 7, 1835, 3 Richardson, Messages and Papers of the Presidents 1789–1897, 147, 172.

[22] Cong. Globe, 33d Cong., 1st Sess., App. 202. See 1 Morison and Commager, The Growth of the American Republic (1950), 621.

been justified in using the Tuscarora lands. But the Federal Power Act requires far more than that to justify breaking up this Indian reservation.

These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have *not* done this and that they have continued their tribal life with trust in a promise of security from this Government.

Of course, Congress has power to change this traditional policy when it sees fit. But when such changes have been made Congress has ordinarily been scrupulously careful to see that new conditions leave the Indians satisfied. Until Congress has a chance to express itself far more clearly than it has here the Tuscaroras are entitled to keep their reservation. It would be far better to let the Power Authority present the matter to Congress and request its consent to take these lands. It is not too late for it to do so now. If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization. It has been known to pass a Joint Resolution in one day where this Court interpreted an Act in a way it did not like. *See Commissioner* v. *Estate of Church*, 335 U. S. 632, 639–640. Such action would simply put this question of authorization back into the hands of the Legislative Department of the Government where the Constitution wisely reposed it.[23]

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[23] *See, e. g., United States* v. *Hellard*, 322 U. S. 363, 367 ("the power of Congress over Indian affairs is plenary"); *United States* v. *Sandoval*, 231 U. S. 28, 45–46; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315 ("it is for that body [Congress], and not the courts"); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 ("plenary authority over

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life.[24] The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

There may be instances in which Congress has broken faith with the Indians, although examples of such action have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.

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the tribal relations of the Indians has been exercised by Congress from the beginning . . . not . . . the judicial department of the government"); *United States* v. *Rogers*, 4 How. 567, 572.

[24] "As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands." Letter from Under Secretary of the Interior Bennett to Federal Power Commission Chairman Kuykendall, December 19, 1958, relating to the taking of these Tuscarora lands for the Niagara Power Project.